Supreme Court, U.S.
FILED
SEP 27 1995
OFFICE OF THE CLERK

No. 95-487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PROPAC-MASS, INC.,

Petitioner,

—v.—

LINDA RUTHARDT, COMMISSIONER OF INSURANCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

EDWARD B. DEUTSCH
(Counsel of Record)
ROBERT L. CLIFFORD
MCELROY, DEUTSCH & MULVANEY
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075
(201) 993-8100

Attorneys for Petitioner,
PROPAC-MASS, INC.

14 pp

QUESTIONS PRESENTED

In this case, Petitioner's license to exchange contracts of reciprocal insurance was revoked by the Commissioner of Insurance of the Commonwealth of Massachusetts by a "Notice of Revocation of License," received by Petitioner on January 3, 1994, that indicated that Petitioner's license had been revoked effective December 31, 1993. Petitioner received no notice or hearing prior to the revocation. The Commissioner and the court below concluded that a trial of an unrelated contract action—during which petitioner was repeatedly informed that its license was not at issue—served as Petitioner's constitutionally-guaranteed hearing. Accordingly, the revocation raises the following significant questions:

(1) Whether Mass. Gen. Laws Ann. ch. 175, § 5 (West 1987), which permits the revocation of a license to transact business without affording an opportunity to be heard, violates the Due Process Clause of the United States Constitution.

(2) Whether the revocation of Petitioner's license without notice or an opportunity to be heard violated Petitioner's right to due process.

(3) Whether "notice" of the revocation of Petitioner's license, purportedly effective four days prior to receipt by Petitioner, violated its right to due process.

PARTIES BELOW

The parties to this case are those listed in the caption of this petition. PROPAC-MASS, Inc., a Massachusetts Corporation without a parent or any subsidiary corporations, was the creator of and attorney in fact for the subscribers of the Massachusetts Employers Insurance Exchange from its inception in 1989 until December 31, 1993. Respondent, Linda Ruthardt, is the Commissioner of Insurance of the Commonwealth of Massachusetts.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	13
I. THE REVOCATION OF ITS LICENSE WITHOUT PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION	13
A. The Court Below Deprived Petitioner Of Due Process Through The Improper Invocation of Collateral Estoppel	14
B. The Failure Of The Court Below To Apply The Minimal Requirements Of This Court's Procedural Due Process Holdings Is Unconstitutional	16
C. The Decision Of The Court Below Upholding The Commissioner's Failure To Give Petitioner The Statutorily- And Constitutionally-Required Notice Prior To The License Revocation Conflicts With Applicable Decisions Of This Court And Denied Petitioner Due Process	25
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	PAGE
Application of the United States, 610 F.2d 1148 (3d Cir. 1979)	20, 23
Armstrong v. Manzo, 380 U.S. 545 (1965)	17, 20
Arnett v. Kennedy, 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974)	26
Baldwin v. Hale, 68 U.S. 223 (1863)	16
Bell v. Burson, 402 U.S. 535 (1971)	17, 19
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	14
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	16, 19
Boddie v. Connecticut, 401 U.S. 371 (1971)	16, 19
Chrisley v. Morin, 126 A.D.2d 977, 978, 511 N.Y.S.2d 753, 754 (4th Dept. 1987)	28
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	19, 22, 25
Cohen v. City of Philadelphia, 736 F.2d 81 (3d Cir. 1984)	26-27
Febish v. New York State Lottery Control Commission, 224 N.Y.S.2d 520 (1961)	23
Fuentes v. Shevin, 407 U.S. 67 (1972)	16-19
Greene v. McElroy, 360 U.S. 474 (1959)	22-23
Hadges v. Yonkers Racing Corporation, 845 F.Supp. 1037 (S.D.N.Y. 1994)	23-24

PAGE

In Re International Re-Insurance Corp., 78 A. 2d 20 744 (1951), *aff'd*, 86 A. 2d 647 (1952) 4

Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 19

Kremer v. Chemical Construction Corp., 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982) 14

Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) 13

Mathews v. Eldridge, 424 U.S. 319 (1976) 17, 20-22

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 26, 27

Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 (1935) 24

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 19, 25-27

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) 14

Phillips v. Vandygriff, 711 F.2d 1217 (5th Cir. 1983), *clarified on reh'g*, 724 F.2d 490, *cert. denied*, 469 U.S. 821 (1984) 22-23

Stanley v. Illinois, 405 U.S. 645, 647 (1971) 19

Traux v. Raich, 239 U.S. 33, 41 (1915) 22

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 22

Constitutional Provisions and Statutes

U.S. Const. amend. XIV, § 1 ..... 2, 17

PAGE

Mass. Gen. Laws Ann. ch. 175, § 5 (West 1987)....2, 5, 6, 8, 9, 11-14, 15, 19, 21-22, 25, 27-28

Mass. Gen. Laws Ann. ch. 175, § 93a (West 1987).....8, 15

Mass. Gen. Laws Ann. ch. 175, § 94A-94M (West 1987).. 3

Mass. Gen. Laws Ann. ch. 175, § 94A (West 1987) 4

Mass. Gen. Laws Ann. ch. 175, § 94B (West 1987) 4

Mass. Gen. Laws Ann. ch. 175, § 94D (West 1987).....5, 7, 23

Mass. Gen. Laws Ann. ch. 175, § 94F (West 1987) 6, 14

Mass. Gen. Laws Ann. ch. 175, § 94K (West 1987) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. ____

PROPAC-MASS, INC.,

Petitioner,

—v.—

LINDA RUTHARDT, COMMISSIONER OF INSURANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioner, PROPAC-MASS, Inc., respectfully prays that a writ of certiorari issue to permit review of the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

On December 31, 1993, the Commissioner of Insurance of the Commonwealth of Massachusetts issued a Notice of Revocation of License. (App. 10a-29a) On March 14, 1994, and March 29, 1994, a Single Justice of the Supreme Judicial Court of Massachusetts entered Orders denying the petition of PROPAC-MASS, Inc. seeking a stay of the Commissioner's license revocation and declaratory relief. (App. 8a-9a) The opinion of the Supreme Judicial Court of Massachusetts, issued on April 11, 1995, affirming the license revocation, is reported at 648 N.E.2d 407 (1995). (App. 1a-7a) On July 11,

1995, PROPAC-MASS, Inc. filed a Petition for a Writ of Certiorari. On July 31, 1995, this Court rejected the Petition on grounds that it had been filed one day late. On August 29, 1995, the Supreme Judicial Court denied Petitioner's Motion for Leave to Enlarge the Time to File Petition for Rehearing. (App. 36a) On September 7, 1995, the Supreme Judicial Court of Massachusetts denied the Petition for Rehearing filed by PROPAC-MASS, Inc. (App. 35a).

Petitioner acknowledges the uncertainty occasioned by the two Orders of the Supreme Judicial Court of Massachusetts, the first denying Petitioner's application to enlarge its time to file for rehearing and the second reciting that Court's consideration of the merits of the Petition for Rehearing and then denying the Petition. Petitioner's position is that inasmuch as the Court below has in fact considered the Petition for Rehearing, that Court's second Order controls. Petitioner is seeking clarification from the Court below.

JURISDICTION

The Supreme Judicial Court of Massachusetts rendered judgment on April 11, 1995. On September 7, 1995, that Court denied the Petition for Rehearing filed by PROPAC-MASS, Inc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution amend. XIV, § 1:

> No State shall * * * deprive any person of life, liberty or property, without due process of law * * *.

Mass. Gen. Laws. Ann. ch. 175, § 5 (West 1987):

The full text of the statute appears at App. 33a-34a.

STATEMENT OF THE CASE

A. Introduction. The facts of significance to this Court's determination whether review is necessary can be summarized very simply. On January 3, 1994, Petitioner received from the Massachusetts Commissioner of Insurance ("the Commissioner") a "Notice of Revocation" of its license to transact its insurance business. That Notice informed Petitioner that its license had, in fact, been revoked effective December 31, 1993—four days *prior* to receipt of the Notice. Petitioner received no notice or hearing before that revocation. The Massachusetts Supreme Judicial Court upheld the Commissioner's action 1) ascribing no constitutional significance to the fact that Petitioner did not receive notice of the loss of its license until after it had already been taken; and 2) holding that Petitioner had received its constitutionally-guaranteed hearing through a prior, unrelated trial of a contract action during which the parties, the court, and representatives of the Commssioner repeatedly acknowledged that Petitioner's license was not—and could not have been—at issue. The Commissioner's failure to provide Petitioner with notice of the revocation of its license or to conduct a hearing prior to the revocation's effective date was unjustified and deprived Petitioner of its constitutionally-guaranteed right to notice of the charges against it and an opportunity to meet them.

B. Facts. The Massachusetts Employers Insurance Exchange ("MEIE" or "the Exchange") is a reciprocal insurance exchange created under the Massachusetts Reciprocal Exchange Law, Mass. Gen. Laws Ann. ch. 175, §§ 94A-94M (West 1987) ("the Reciprocal Law"). A reciprocal insurance exchange is "an aggregation of individuals, partnerships or corporations, . . . called subscribers, who or which, under a common name, exchange contracts of insurance on the reciprocal or inter-insurance plan through the office of an Attorney

in Fact, being the place where contracts of insurance are issued." Mass. Gen. Laws Ann. ch. § 94A.[1]

From January 1, 1989, to December 31, 1993, Petitioner controlled and operated the Exchange as its Attorney in Fact. "Attorney in fact" is defined in the statute as "an individual, partnership or corporation acting under power of attorney as the representative of the subscribers in the exchange of reciprocal or inter-insurance contracts and matters incident thereto." *Id.* Subscribers are "the participants or policyholders, who have given to an Attorney in Fact a power of attorney giving authority to obligate them separately and severally . . . in the exchange of reciprocal or inter-insurance contracts." *Id.* In the case at hand, the subscribers are more than eight-hundred Massachusetts employers who have indemnified each other against losses and expenses associated with their obligation to provide workers' compensation benefits to their injured workers. Under the express terms of the Reciprocal Law, it is through the execution of individual but common powers of attorney, approved by the Commissioner, that each subscriber authorizes the attorney in fact to exchange contracts of insurance with all other subscribers on its behalf. *See* Mass. Gen. Laws Ann. ch. 175, §§ 94B, 94D (West 1987).

---

[1] The nature of an exchange has been described as follows:

> a system of insurance under which several individuals may underwrite each other's risks against various hazards through an attorney-in-fact, *common to all*, under an agreement that each underwriter acts separately and severally and not jointly with any other. All the subscribers are insured and at the same time are insurers. . . . The attorney-in-fact represents each subscriber individually in exchanging insurance with others and is authorized to do every act that the subscriber could do in relation to the common enterprise. . . . All exchanges of insurance are effected through . . . the common attorney-in-fact. The subscriber pays a premium or membership fee to the exchange. From the premium a fixed percentage is deducted as the attorney-in-fact's fee.

In re International Re-Insurance Corp., 78 A.2d 744, 745-46 (Del.Super.Ct.1951), *aff'd*, 86 A.2d 647 (1952) (emphasis added).

In addition, the statute requires that an "advisory committee" composed of not fewer than three subscribers be elected or appointed, with the authority and duties specified in the power of attorney. Mass. Gen. Laws Ann. ch. 175, 94K.

On December 9, 1988, the Commissioner issued a license to Petitioner, authorizing it to execute contracts of reciprocal or inter-insurance for the subscribers of MEIE. On January 1, 1989, Petitioner began transacting business and executed inter-insurance contracts for the subscribers under the name MEIE. This was the first and only successful organization of a reciprocal exchange since the enactment of the Reciprocal Law in 1947.

As a direct result of the experienced, prudent, and disciplined management and oversight practices implemented by Petitioner in the operation of the Exchange, the subscribers enjoyed extremely favorable operating results, cost savings, and growth. Due to the success of the Exchange, the number of subscribers increased from the original fifty to more than eight-hundred by 1993. By year end 1993, premium volume was expected to exceed $65 million. The Exchange's surplus level was more than $21 million. In addition, MEIE was so successful under the direction, control, and management of Petitioner that it had set aside more than six million dollars in individual subscriber savings accounts, which amount was to be returned to subscribers as unused premiums.[2]

Petitioner's tenure as Attorney in Fact continued until year end 1993 when, in direct contravention of the protections afforded by the Due Process Clause of the United States Constitution, the Commissioner revoked its license pursuant to Mass. Gen. Laws Ann. ch. 175, § 5.[3] On December 31, 1993,

---

[2] PROPAC's success contrasted markedly from the then-existing and widely-recognized "crisis" in the Massachusetts workers' compensation industry caused by "insufficient premiums" and a "$400 million deficit." Boston Globe, January 12, 1993, at 44.

[3] Mass. Gen. Laws Ann. ch. 175, § 94F (West 1987) provides that the license of an attorney in fact of a reciprocal insurance exchange is

the Commissioner issued the Notice of Revocation of License (App. 10a-15a), effective that day. The "Notice" was sent to Petitioner via registered mail. Petitioner did not receive the "Notice" until January 3, 1994, *four days after* the Commissioner had revoked its license.[4]

The license revocation was based, in large part, on an opinion issued on December 30, 1993, by a Judge of the Superior Court of the Commonwealth of Massachusetts in an action for breach of contract brought against Petitioner by the advisory committee of the Exchange. (App. 16a-29a) A discussion of that action and the opinion is necessary to a complete understanding of the issues raised in this petition.

Contract Litigation And Opinion Of The Massachusetts Superior Court

On December 9, 1988, the date on which the Commissioner issued Petitioner its license, Petitioner and two of the organizers of MEIE entered into an Attorney-in-Fact Agreement ("the Agreement"). The Agreement contained two provisions by which the subscribers of MEIE could terminate it.

Paragraph 16 of the Agreement, which had an initial term of five years, provided, among other things, that either *party* could terminate the contract by providing one year's prior written notice. The Agreement further provided that, should

---

subject to § 5. Section 5 sets forth the circumstances in which the Commissioner may revoke the licenses of foreign insurance companies and attorneys in fact of reciprocal insurance exchanges.

[4] Pursuant to the terms of Mass. Gen. Laws Ann. ch. 175, § 5, on January 11, 1994, Petitioner sought review of the license revocation before a Single Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts on grounds, among others, that the revocation violated due process. The Commissioner filed an answer on February 25, 1994. The Single Justice held a hearing on March 9, 1994. By orders dated March 14, 1994, and March 29, 1994 (App. 8a-9a), the Single Justice summarily denied Petitioner's application. Pursuant to the statute, Petitioner appealed to the full court of the Supreme Judicial Court on May 31, 1994.

such notice be given by either party, both parties were to cooperate in the transfer of management service functions.

By letter dated December 4, 1992, the advisory committee of MEIE informed Petitioner that it had decided to terminate the Agreement effective December 31, 1993, pursuant to paragraph 16. Petitioner challenged the attempted termination, asserting that the Agreement was invalid from its inception as contrary to the Massachusetts statutory scheme regarding reciprocals, or, in the alternative, that the advisory committee had no authority to effect a termination without cause under Paragraph 16.[5] On August 20, 1993, Petitioner filed a complaint in the Massachusetts Superior Court against the advisory committee and others seeking, among other relief, a declaratory judgment that the committee lacked authority to terminate the Agreement or replace Petitioner as Attorney in Fact.

On August 23, 1993, MEIE, and the Associated Industries of Massachusetts, Inc. ("AIM"),[6] filed a complaint against Petitioner in Massachusetts Superior Court, claiming that Petitioner had been properly terminated and had breached the Agreement by allegedly failing to cooperate in an orderly

---

[5] The Reciprocal Law does not allow the submission of an Attorney in Fact Agreement, such as was executed by Petitioner and the two organizers, as part of the regulatory approval process of an exchange. Accordingly, and as Petitioner argued in the contract action, the Agreement, from its inception, was invalid under the statutory scheme. *See* Mass. Gen. Laws Ann. ch. 175, § 94D. Under the express terms of the statute, it was through the individual powers of attorney executed by each subscriber that Petitioner was given the power to exchange contracts of insurance on their behalf and conduct the affairs of the Exchange. Accordingly, it was only through the cancellation of the individual powers of attorney that Petitioner's status as attorney in fact could be terminated.

[6] AIM, a trade association of Massachusetts businesses, was the sponsor of MEIE, which enlisted Petitioner to form the Exchange. AIM is also the parent of MEIE-AIF, the entity that was improperly licensed by the Commissioner to replace Petitioner as attorney in fact and that ultimately gained control of its lucrative business.

transition of Petitioner's duties to the entity purporting to be MEIE's new Attorney in Fact. The complaint also alleged violations of the implied covenant of good faith and fair dealing and Massachusetts' Unfair Trade Practices Law, Mass. Gen. Laws Ann. ch. 93a (West 1987). Prior to the resolution of the litigation concerning the issue whether Petitioner could be terminated without cause by the advisory committee, the Commissioner improperly licensed a new attorney in fact to replace Petitioner effective January 1, 1994. *See* n.6.

A bench trial of that action commenced in the Massachusetts Superior Court on December 2, 1993. Petitioner's license was expressly *not* at issue—nor could it have been—in that case. On December 30, 1993, the trial court issued its Findings of Fact and Conclusions of Law, holding that Petitioner had breached the Agreement and the implied covenant of good faith and fair dealing, and had violated Mass. Gen. Laws Ann. ch. 93a. (App. 16a-29a) Also on December 30, 1993, the Commissioner required that Petitioner attend a meeting at her office at which the main subject of discussion was the issuance of the Superior Court's Findings of Fact and Conclusions of Law. During the entire course of the meeting, the Commissioner never mentioned the subject of the revocation of Petitioner's license.

The following day, the Commissioner revoked Petitioner's license pursuant to Mass. Gen. Laws Ann. ch. 175, § 5, on grounds that Petitioner had engaged in conduct that rendered its further transaction of business hazardous to the public. Before revoking the license, the Commissioner gave no notice, conducted no hearing, and made no findings of fact on that issue.

Conceding that she had afforded Petitioner no opportunity to be heard prior to the license revocation, the Commissioner, nonetheless, contended below that Petitioner had been afforded due process by the trial of the contract litigation. The trial did *not* provide, and could not have provided, Petitioner

with a hearing on the issue before the Commissioner under Mass. Gen. Laws Ann. ch. 175 § 5: whether Petitioner's continued transaction of business would be hazardous to the public or to the subscribers to the Exchange.[7] Rather, the three issues before the Superior Court were (1) the validity of the Agreement between Petitioner and the Exchange and whether the Exchange's advisory committee, a non-party to that agreement and this litigation, could terminate it; (2) whether Petitioner breached the implied covenant of good faith and fair dealing contained in that agreement; and (3) whether Petitioner violated Mass. Gen. Laws Ann. ch. 93a.

Moreover, even could the revocation of the license have been addressed in the contract action, the Commissioner's failure to so notify Petitioner—and thus enable it to prepare a defense—misled Petitioner and denied it due process of law. The subject of Petitioner's license had surfaced several times during the trial in the Superior Court. The parties, the trial judge and *representatives of the Division of Insurance* consistently and unequivocally agreed that Petitioner's license was not at issue in that proceeding. Indeed, the precise question whether Petitioner's license had been at issue in that proceeding had been specifically addressed on at least three separate occasions. On the fifth day of testimony, counsel for Petitioner informed the Court that he was

> concerned that, in fact, the license of PROPAC- MASS is somehow at issue. And one of the concerns we've had, and we've raised this issue, is that the license does not—is not impacted by this agreement. This agreement does not give rise to the license. So, we are arguing—
>
> THE COURT: No, but you're being sued in breach of contract.

---

[7] Section 5 provides the only mechanism for revocation of the license of a domestic attorney in fact, and that power may be exercised solely by the Commissioner of Insurance and only in the limited circumstances set forth in the statute.

MR. BEHAR: That's right.

THE COURT: Nothing to do with the license, as I understand it.

* * *

THE COURT: . . . [I]t looks to me that this case is, one, a breach of contract case; number two, breach of the implied covenant of good faith and fair dealing under a breach of contract case.

MR. KAPLAN: Exactly so, Your Honor.

THE COURT: And number three, a 93A action or actions taken to frustrate the terms of a contract that the parties agreed to perform.

MR. KAPLAN: Exactly, Your Honor.

THE COURT: And that is the extent of it. And [the] license has got nothing to do with it. Is that correct?

MR. KAPLAN: Yes, Your Honor.

THE COURT: All right. . . . So, we now know, Mr. Behar, that [the] license has got nothing to do with it.

In his closing argument counsel for the advisory committee again conceded that

> [w]hen the discussion gets to licensure and no licensure, Your Honor, I submit those are all regulatory matters for the Commissioner. If you don't like the result, that's what chapter 30A is all about. We are here only on the terms of the contract . . . .

That the license had not been at issue was emphatically confirmed again by the trial court at a post-trial hearing held on January 6, 1994, to address the form of the judgment. Significantly, the Assistant General Counsel and Deputy General Counsel of the Division of Insurance were present at and par-

ticipated in that hearing. At the hearing, counsel for the advisory committee again stated that

> [t]he issue of PROPAC's license was not before the court. We have not asked the court to enter any relief with respect to that license, and in fact today it seems to me that any relief with respect to the issue of that license itself is with the SJC.

When Petitioner's then-counsel later broached the subject of the license revocation, the trial court interrupted and precluded him from discussing the license:

> THE COURT: You're aware that the matter—you are keenly aware that matter of revocation was never before me.
>
> MR. BEHAR: I am aware of that. It has been brought to Your Honor's attention—
>
> THE COURT: I'm speaking, it was not an issue in a [sic] lawsuit.

The Commissioner's representatives, who actively participated in that hearing, voiced no objection to the court's statements. Yet, in response to Petitioner's later due-process challenge to the license revocation in the court below, the Commissioner asserted that "the trial in the Superior Court gave all the process due" Petitioner on the license-revocation issue. The Commissioner's designation of that trial as Petitioner's "hearing," after having remained silent as Petitioner was prevented by the trial court from addressing the license issue, constitutes a disingenuous denial of due process of law.

C. The Opinion Below. Following the license revocation and pursuant to M.G.L. c. 175, § 5, Petitioner appealed to the Supreme Judicial Court, arguing that the Commissioner's revocation of its license was improper because, *inter alia*, 1) Mass. Gen. Laws Ann. ch. 175 § 5 violates due process by permitting a license revocation without affording a prior hearing; 2) Peti-

tioner was denied any hearing regarding the sole issue of importance in respect of the license revocation, namely, whether Petitioner's continued licensure would be hazardous to the public; and 3) due process mandated that PROPAC receive notice of the revocation of its license before the revocation became effective.

The court below completely disregarded the constitutional deficiencies in the Commissioner's actions. The court avoided deciding the validity of Section 5, summarily holding that the decision rendered in the contract action (the same hearing that had been described as having "nothing" to do with Petitioner's licensure by opposing counsel, the court, and the Commissioner's office) was Petitioner's "hearing" on the issue of whether Petitioner's continued licensure was "hazardous to the public or policyholders." In addition, the Supreme Judicial Court ascribed no constitutional significance to the fact that Petitioner did not learn of the revocation of its license until three days after the Commissioner had revoked it.

For the reasons enumerated herein, the actions of the Commissioner clearly violated due-process protections. The Supreme Judicial Court's judgment ignored controlling precedent of this Court regarding procedural due process. This Court should grant certiorari to address the significant constitutional issues erroneously decided or ignored below.

REASONS FOR GRANTING THE WRIT

I

THE REVOCATION OF ITS LICENSE WITHOUT PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION

The revocation of Petitioner's license without prior notice and an opportunity to be heard violated Petitioner's right to due process guaranteed under the Fourteenth Amendment to the United States Constitution. The decision of the court below upholding that revocation must be reviewed because (1) the court deprived Petitioner of due process through the inappropriate application of collateral estoppel; (2) the statute on which the revocation was predicated, because it allows revocation of a license without a prior hearing, violates due process and controlling precedent; and (3) the revocation was without notice and therefore violated due process.

Mass. Gen. Laws Ann. ch. 175, § 5 ("Section 5"), among other things, sets forth the circumstances in which the license of a foreign insurance company can be revoked by the Commissioner of Insurance. Section 5 states, in relevant part, that

> [i]f the Commissioner is satisfied, upon examination or other evidence submitted to him, that any foreign company is insolvent or in an unsound financial condition, or that its business policies or methods are unsound or improper, or that its condition or management is such as to render its further transaction of business hazardous to the public or its policyholders . . . he shall revoke the license issued to said company . . . . *He shall give written notice to the company specifying the date on which said revocation . . . shall be effective* . . . and the ground for such revocation. . . provided, that if the ground for revocation . . . is that the company has vio-

> lated any provision of law or has failed to comply with its charter, the effective date of such revocation . . . shall be not less than ten days from the issue of said notice. . . . A company aggrieved by a revocation . . . of its license hereunder, may within ten (10) days from the effective date of such revocation . . . file a petition in the Supreme Judicial Court for the County of Suffolk for a review of such action of the Commissioner. The court shall summarily hear and determine the question whether the ground for such revocation . . . specified in the Notice of the Commissioner exists and may make an appropriate order or decree. If the order or decree is adverse to the petitioning company it may within ten (10) days therefrom appeal to the full court.

(Emphasis supplied). Under Mass. Gen. Laws Ann. ch. 175, § 94F, the license of an attorney in fact of a reciprocal insurance exchange is subject to Section 5.

The Commissioner revoked Petitioner's license to transact business as the Attorney in Fact for MEIE pursuant to Section 5. The deprivation of Petitioner's property interest in its license was accomplished before Petitioner received notice of the revocation and was afforded an opportunity to "present [its] case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). The court below improperly affirmed that denial of due process. That decision conflicts with applicable precedents of this Court and therefore must be reviewed.

A. The Court Below Deprived Petitioner Of Due Process Through The Improper Invocation Of Collateral Estoppel.

This Court has placed strict constitutional limits on the use of collateral estoppel. *See, e.g., Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, *reh'g denied*, 458 U.S. 1133

(1982). Those limits prohibit issue preclusion unless the party estopped had a full and fair opportunity to litigate the issue and a factual determination against that party had been made. Contrary to the opinion of the court below, no such prior determination occurred in this case. The result below thus conflicts with this Court's collateral estoppel—due process analysis in *Blonder-Tongue*, *Parklane Hosiery*, and *Kremer*.

To avoid constitutional scrutiny of both the statute and the Commissioner's failure to afford even minimal due-process protections before revoking Petitioner's license, the court below held that Petitioner was bound by the findings of fact made by a judge in a prior Massachusetts Superior Court action that did not provide Petitioner with a hearing on the issue governing the revocation of its license: whether Petitioner's continued transaction of business would be hazardous to the public or the subscribers of the Exchange. Rather, the Superior Court action involved litigation of an unrelated contract dispute, which included a claim for breach of contract, an alleged violation of the implied covenant of good faith and fair dealing, and an alleged violation of the Massachusetts Unfair Trade Practices Law, Mass. Gen. Laws Ann. ch. 93a. In ruling on those purely contractual issues, the Superior Court never addressed the issue facing the Commissioner regarding the continued licensure of Petitioner as Attorney in Fact of the Exchange.

Moreover, as set forth in the statute, and as specifically and repeatedly acknowledged by the trial court itself, the parties to that action, *and representatives of the Division of Insurance*, the issue of the revocation of Petitioner's license could not have been decided in that forum. *See*, *supra* at 8 n.7. Thus, the Commissioner's fallacious reliance on that unrelated proceeding to revoke petitioner's license without affording due process was improper. It was also misleading. Although presented with the opportunity, the Commissioner declined to inform Petitioner of her plan to use the trial court's findings as the basis for the intended license revocation. Had that intent

been communicated, Petitioner would then have had *some*, albeit minimal, notice and an opportunity to contest the revocation prior to its effective date.

The lower court's rote affirmance of that blatant denial of fundamental due-process protections was erroneous. Because the issue necessary to the license revocation was not and could not have been litigated in the prior proceeding, the invocation of the doctrine of collateral estoppel by the court below likewise was simply wrong. Because Petitioner was thus denied notice and an opportunity to contest the revocation before it took effect, Petitioner was denied due process and review by this Court is warranted.

B. The Failure Of The Court Below To Apply The Minimal Requirements Of This Court's Procedural Due Process Holdings Is Unconstitutional.

The court below improperly avoided deciding the question whether Section 5 violates due-process requirements because it does not require a pre-revocation hearing. Section 5 denies due process to entities subject to its provisions because it provides for *no* opportunity to contest a license revocation prior to its accomplishment. Under well-settled precedents of this Court, resort to a post-deprivation hearing is permissible only in extraordinary circumstances in which there has been a demonstrated governmental interest that justifies postponing the hearing until after the event. *Boddie v. Connecticut*, 401 U.S.371, 379 (1971). No valid governmental interest was demonstrated below. Accordingly, review of the constitutionality of the statute is appropriate at this time.

This Court has described the "central meaning" of procedural due process as follows: " 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). The "root requirement" of due process is that "the right to notice and an opportunity to be heard

'must be granted at a meaningful time and in a meaningful manner.' " *Id.* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).[8]

The opportunity for a hearing must be given before the deprivation of a property interest "except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." *Boddie, supra*, 401 U.S. at 379. *See also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.7 (1972) (stating that instances that justify deprivation of protected interest without prior hearing are "rare and extraordinary"). When "protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents, supra*, 408 U.S. at 569-70.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court articulated a three-part balancing test to determine whether government procedures satisfy due-process requirements. Under *Mathews*, "the specific dictates of due process" require consideration of

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. With few exceptions, this Court has held that government procedures that afford hearings only *after* the deprivation of a property right violate due process.

---

[8] The right to a prior hearing attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection. *Fuentes, supra*, 407 U.S. at 84. A license issued by the government is a property interest protected by the Due Process Clause. *See Bell v. Burson*, 402 U.S. 535, 539 (1971).

At issue in *Fuentes*, *supra*, was the constitutionality of two prejudgment replevin statutes, neither of which provided for notice or an opportunity to be heard prior to the State's seizure of goods. 407 U.S. at 80. Like Section 5, both statutes provided only for post-deprivation hearings. The issue in *Fuentes*, as in this case, was whether procedural due process required an opportunity for a hearing *before* the State seized the property. *Id.* In holding the statutes unconstitutional, the Court observed that

> [t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.
>
> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . [And n]o better instrument has been devised for arriving

> at truth than to give a person in jeopardy a serious loss notice of the case against him and opportunity to meet it."

Id. at 80-81 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)) (omission in original) (citations omitted). Citing its previous "tolerat[ion]" of variances in the *form* of a hearing " 'appropriate to the nature of the case' and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' " *id.* at 82 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), and *Boddie*, *supra*, 401 U.S. at 378), the Court reiterated its traditional insistence that "whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes effect." *Id.* at 82 (citing *Bell*, *supra*, 402 U.S. at 542) (emphasis added) (other citations omitted). The Court further commented on the ineffectiveness of a *post*-deprivation hearing:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

Id. at 81-82 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1971)).

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985), plaintiffs challenged the constitutionality of statutory dismissal procedures that did not provide a tenured

public employee an opportunity to respond to charges against him prior to dismissal for cause. As in this case, plaintiffs were entitled to judicial review following the discharge. *Id.* at 547-48.

Applying the *Mathews* criteria, the Court held the statutes constitutionally defective for failing to provide " 'some kind of a hearing prior to termination.' " *Id.* at 542 (quoting *Board of Regents*, *supra*, 408 U.S. at 570). The Court noted that the hearing need not be a "full adversarial evidentiary hearing" and "need not definitively resolve the propriety of the discharge." *Id.* at 545. Rather, the hearing need only afford

> an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. . . . The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 545-46 (citations omitted).

Under *Mathews*, "the factor which calls most strongly for a pre-enforcement hearing is the risk of an erroneous deprivation of a property right." *Application of the United States*, 610 F.2d 1148, 1157 (3d Cir. 1979). In that case the court considered whether a district court was required to provide a hearing before requiring a telephone company to assist the government in tracing telephone calls. In holding that a pre-enforcement hearing was required, the court noted that "[w]ithout a prior hearing a district court is not likely to learn that a tracing order is too burdensome until after the company has carried out the order." *Id.* The court noted that the rights at issue are of "primary importance to a large business enter-

prise. Companies should not lose a meaningful opportunity to protect those rights without substantial reasons." *Id.*

The foregoing precedents overwhelmingly demonstrate that Section 5 unconstitutionally works a deprivation of property without due process of law insofar as it denies the right to be heard prior to a license revocation. Section 5 does not provide for an opportunity to be heard at "a meaningful time and in a meaningful manner." *Armstrong*, *supra*, 380 U.S. at 552. The statute requires only that if the Commissioner is "satisfied" that a company's "condition or management is such as to render its further transaction of business hazardous to the public or its policyholders," the Commissioner send "written notice . . . specifying the date on which such revocation . . . shall be effective . . . and the ground for such revocation." In addition, Section 5 does not require the Commissioner to make any *findings of fact* concerning that determination.

Section 5 provides for post-revocation review by a Single Justice of the Supreme Judicial Court, who is required "summarily [to] hear and determine the question whether the ground for revocation . . . specified in the notice of the commissioner exists." If the only requirements imposed on the Commissioner are those in Section 5, how a Single Justice can review the Commissioner's action is unclear. Without the benefit of a prior hearing or even a requirement that the Commissioner make findings of fact, the reviewing justice is required to examine only the Commissioner's blanket statement that a ground for revocation exists. Clearly, without findings on all material issues presented by the record, the reviewing court cannot properly exercise its appellate function. Under Section 5, not only do no findings presented by the record exist—*no record exists*.

Balancing the three interests outlined in *Mathews*—which the court below declined to do—compels the conclusion that the procedures afforded under Section 5 are constitutionally defective. First, the significance of Petitioner's private interest in retaining its license—indeed, its means of livelihood—

"cannot be gainsaid." *Cleveland Bd. of Educ.*, *supra*, 470 U.S. at 543. Procedural due process requires confrontation and cross-examination of those whose word deprives a person of his or her livelihood. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103 (1963). The observation of this Court in *Cleveland Bd. of Educ.*, *supra*, 470 U.S. at 543, concerning the "fired worker" who may be able to find employment elsewhere but will be burdened by "the questionable circumstances under which he left his previous job," is even more compelling as applied to Petitioner. As a result of the revocation, Petitioner will be precluded from conducting any insurance-related business in the Commonwealth of Massachusetts without having had any opportunity to contradict its accusers. The ability of its principals to become licensed as attorneys in fact for exchanges in other states likewise has been effectively vitiated. The revocation of Petitioner's license, even if ultimately reversed, has irrevocably damaged the reputations of its principals. No demonstrated governmental interest in immediate revocation outweighs those interests. *See Greene v. McElroy*, 360 U.S. 474 (1959) (finding that revocation of security clearance effectively disqualified aeronautical engineer from future work in his entire field and therefore entitled him to pre-deprivation hearing); *Phillips v. Vandygriff*, 711 F.2d 1217, 1222 (5th Cir. 1983) (" 'the right to work in the common occupations is the very essence of the personal freedom and opportunity' " that due-process requirement seeks to protect (quoting *Traux v. Raich*, 239 U.S. 33, 41 (1915))), *clarified on reh'g*, 724 F.2d 490, *cert. denied*, 469 U.S. 821 (1984).

As in *Phillips* and *Greene*, the Commissioner's action in this case has extinguished the employment prospects of Petitioner's principals, both of whom have dedicated the majority of their professional lives to the insurance industry. The facts cannot be stated more simply: the Commissioner took Petitioner's means of livelihood and, without compensation, gave it to someone else. In fact, AIM, a subscriber and one of

the plaintiffs in the contract action, ultimately gained control of the Exchange by securing, with the aid of the Commissioner, the licensure of MEIE-AIF, AIM's wholly-owned subsidiary, as the new Attorney in Fact for the Exchange.

Second, consideration of the "factor that calls most strongly for a pre-enforcement hearing"—the risk of an erroneous deprivation of property and the probable value of additional or substitute procedural safeguards—demonstrates that Petitioner was entitled to a prior hearing. *See Application of United States, supra*, 610 F.2d at 1157. As outlined above, the risk of an erroneous deprivation of property is extreme if the Commissioner is not required to create any record, make any findings of fact, or allow the company whose license is to be revoked a chance to address the charges or offer evidence to rebut those charges.

Equally significant is the manifest fact that the requirement of a prior hearing carries no severe burden for the Division of Insurance. Indeed, the public interest is best served in such a case by requiring a preliminary, public hearing. A determination concerning the license of an exchange not only affects the licensee, but also has a *substantial* impact on the exchange's subscribers. The revocation of Petitioner's license (and its *de facto* revocation by virtue of the Commissioner's improper licensing of a second Attorney in Fact[9]) also inter-

---

[9] Unquestionably, only one attorney in fact may act for a reciprocal exchange at any given time. *See* Mass. Gen. Laws Ann. ch. 175, § 94D. That being so, the Commissioner's licensing of MEIE-AIF as "successor Attorney-in-Fact" on October 22, 1993, when Petitioner's license was intact and Petitioner was servicing the Exchange, constituted a *de facto* revocation of Petitioner's license for which Petitioner was not afforded notice and an opportunity to be heard. *See, e.g., Febish v. New York State Lottery Control Comm'n*, 224 N.Y.S.2d 520, 523 (1961) (holding that where license specified sites of proposed bingo games, commissions ruling that bingo would no longer be played at sites amounted to a *de facto* revocation of license without required notice); *Hadges v. Yonkers Racing Corp.*, 845 F.Supp. 1037, 1040 (S.D.N.Y. 1994) (holding that Racing Corporation's decision to bar plaintiff from racing at

fered with the contractual rights and insurance coverage of each of the more than eight-hundred subscribers of the Exchange. The interests of the subscribers would have been best served by ensuring that a revocation of Petitioner's license was based on correct determinations of fact and reasoned conclusions concerning the danger, if any, involved in PROPAC's continued transaction of business. Any purported interest in immediate revocation cannot and does not outweigh the obvious interest of the subscribers in being fully informed on issues of critical importance to at least the perceived effect of the displacement of their Attorney in Fact on their continued insurance coverage. Providing a hearing would have afforded the requisite assurance and would have imposed neither a significant administrative burden nor intolerable delay.

Finally, the government interests involved do not justify dispensing with the prior-hearing requirement. Petitioner recognizes that the Division has an interest in protecting the public from practices of a foreign insurance company, to which it may not have immediate access, that appear contrary to the public good. Foreign insurance companies "as distinguished from domestic companies generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 585 (1935). That interest, however, is simply not implicated with a domestic exchange and is not served by arbitrary and uninformed actions by the Commissioner. In fact, that interest is severely jeopardized when a government official takes action of the kind taken in the present case.

---

raceway "served as a *de facto* revocation of his state racing license because the other harness racing tracks would follow [Corporation's] lead and bar him from their facilities as well," noting that "[e]ssential . . . is plaintiff's claim that there is a secret agreement among all of the trotting tracks that barring a license from one will result in the applicant being barred from all").

Scrutiny of Section 5 under *Mathews* and the other applicable precedents reveals its constitutional invalidity as it applies to the attorney in fact of a domestic insurance exchange such as Petitioner. The statute's provision of a post-revocation hearing does not provide for an opportunity to be heard at a meaningful time and in a meaningful manner. The government's interest in immediate revocation does not outweigh the "obvious value in reaching an accurate decision." *Cleveland Bd. of Educ.*, *supra*, 470 U.S. at 543. As was noted in that case, "[e]ven where the facts are clear, the appropriateness or necessity of the [revocation] may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be *before* the termination takes effect." *Id.* (emphasis added). Because the statute provides for no such opportunity, review by this Court is necessary, and the statute should be stricken.

C. The Decision Of The Court Below Upholding The Commissioner's Failure To Give Petitioner The Statutorily- And Constitutionally-Required Notice Prior To The License Revocation Conflicts With Applicable Decisions Of This Court And Denied Petitioner Due Process.

Due process requires *both* notice and an opportunity to be heard. The notice under due process must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, *supra*, 339 U.S. at 314. "The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest . . . ." *Id.* The Commissioner revoked Petitioner's license on December 31, 1993, "effective immediately." Thus, in contravention of the express requirements of the statute, and, more important, prior decisions of this Court, no notice of revocation was given. The applicable precedents require,

at a minimum, that notice precede the deprivation of a property interest.

In *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), the Court considered the constitutionality of the notice provided by a utility company to a customer stating that payment was overdue, that the notice was a "final notice" and that utility service would be terminated if payment was not tendered by a specified date. *Id.* at 13. The notice failed to inform the customer of the availability of an avenue of redress to contest a particular charge. *Id.* The Court found that the notice failed to satisfy due-process requirements, saying:

> Petitioners' notification procedure, while adequate to apprise the Crafts of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. *Mullane v. Central Hanover Trust*, supra, at 314, 70 S.Ct. at 657. *The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for*, an impending "hearing."

Id. at 14 (emphasis added). *See also Cohen v. City of Philadelphia*, 736 F.2d, 81, 84 (3d Cir. 1984) ("The right to a hearing is certainly of little value without prior notice of the charges presented, in sufficient detail fairly to enable the party charged to demonstrate any error that might exist."); *Arnett v. Kennedy*, 416 U.S. 134, 170-71 (holding that due process required that tenured public employee receive notice of charges against him and explanation of employer's evidence), *reh'g denied*, 417 U.S. 977 (1974).

Completely ignoring those basic principles of due process and fundamental fairness, the court below upheld the Commissioner's revocation of the license without any prior notice to Petitioner. Section 5 requires the Commissioner, *prior* to the license revocation, to "give *written notice* to the company specifying the date on which said revocation . . . *shall be*

effective . . . and the ground for such revocation . . . ." Due process, the plain language of the statute, and common experience require that the notice given by the Commissioner *precede* the actual license revocation. The use of the word "shall" indisputably contemplates future action. Constitutionally implicit in that requirement is that the notice "enable the party charged to demonstrate that any error might exist." *Cohen*, *supra*, 736 F.2d at 84.

The Commissioner's failure to provide *any* notice of the license revocation violated due process because Petitioner was not "informed that the matter was pending." *Mullane*, *supra*, 339 U.S. at 314. The Commissioner issued the Notice of Revocation of License on December 31, 1993. (App. 10a-15a) The Notice expressly stated that it was effective *that day*: "it is hereby ordered that Petitioner's license is revoked, effective immediately." (App. 14a) The "Notice" of Revocation was sent by registered mail to PROPAC and was not received until January 3, 1994, *four days after* the license had been revoked.[10] Thus, in clear violation of Section 5, and of all due

---

[10] The action of the Commissioner is rendered even more egregious by the fact that on December 30, 1993, the day before the revocation, Petitioner's principals met with the Commissioner in her office to discuss, among other things, the decision of Judge Roseman in the breach-of-contract case. The Commissioner did not, during the entire course of that meeting, even hint at the fact that she was contemplating a revocation of Petitioner's license. Had she done so at that time, she would, at the very least, have put PROPAC on notice of the impending revocation and given it some form of "opportunity to present [its] objections." *Memphis Light*, *supra*, 436 U.S. at 14. As the *Memphis Light* Court noted, "The opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances." *Id.* at 16 n.17. Petitioner does not concede that such an "informal consultation" would have sufficed in this case, but refers to the procedure only to highlight the Commissioner's complete disregard of her constitutionally imposed obligation to preserve Petitioner's due process rights. The Commissioner's failure to provide *any* notice to Petitioner of the revocation of its license renders her action, and the revocation itself, constitutionally defective.

process requirements, PROPAC received no notice of the revocation of its license as Attorney in Fact for MEIE. *See Chrisley v. Morin*, 511 N.Y.S.2d 753, 754 (4th Dept. 1987) (annulling as "constitutionally [un]acceptable" decertification of plaintiff's business enterprise status where no notice was given "that her certification was in jeopardy prior to her decertification" and where she was not "given an opportunity to submit any evidence on her own behalf").

Noting that Section 5 provides that a revocation based on grounds that a company violated a provision of law or failed to comply with its charter—neither of which is implicated in this case—may not be effective in less than ten days from the date of the issuance of the notice (App. 33a), the below court correctly observed that revocations for any other reason have no such statutorily-imposed time limitation.[11] Disregarding entirely any concept of fundamental fairness, the court below could "see no reason why," in this case, the Commissioner could not "announce that the license is revoked effective immediately." (App. 6a-7a) Even more incredibly, the court further saw no "reason to declare the revocation invalid, even if immediate revocation were not authorized." (App. 7a) The court below ascribed no significance to the failure to provide notice prior to the effective date, even though that left Petitioner with only seven days to prepare its initial appeal to the Single Justice rather than the ten days accorded under the statute.

The court below failed or refused, without justification, to consider the constitutional implications of permitting the deprivation of a significant property interest without notice. Due process requires that this Court consider the question.

---

[11] The statute provides, in pertinent part, that if the

> ground for revocation . . . is that the company has violated any provision of law or has failed to comply with its charter, the effective date of such revocation . . . shall be not less than ten days from the date of issue of said notice. . . .

Mass. Gen. Laws Ann. ch. 175, § 5. (App. 33a)

CONCLUSION

For all the reasons set forth above, Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

EDWARD B. DEUTSCH
(Counsel of Record)
ROBERT L. CLIFFORD
MCELROY, DEUTSCH & MULVANEY
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075
(201) 993-8100

Attorneys for Petitioner,
PROPAC-MASS, Inc.

September 20, 1995

TABLE OF CONTENTS

		PAGE
A.	Opinion of the Supreme Judicial Court of Massachusetts, April 11, 1995	1a
B.	Amended Order of the Supreme Judicial Court of Massachusetts, March 29, 1994	8a
C.	Order of the Supreme Judicial Court of Massachusetts, March 14, 1994	9a
D.	Notice of Revocation of License by Linda Ruthardt, Massachusetts Commissioner of Insurance, December 31, 1993	10a
E.	Findings of Fact and Conclusions of Law of the Superior Court of Massachusetts, December 30, 1993	16a
F.	Judgment of the Superior Court of Massachusetts, January 6, 1994	30a
G.	Mass. Gen. L. ch. 175, § 5	33a
H.	Order of the Supreme Judicial Court of Massachusetts, September 7, 1995	35a
I.	Order of the Supreme Judicial Court of Massachusetts, August 29, 1995	36a

APPENDIX A

SUPREME JUDICAL COURT OF MASSACHUSETTS
SUFFOLK

Jan. 12, 1995.
Decided April 11, 1995.

PROPAC-MASS, INC.

—v.—

COMMISSIONER OF INSURANCE.

Before LIACOS, C.J., and
WILKINS, NOLAN and GREANEY, JJ.

EDWARD B. DEUTSCH, Morristown, N.J. (Raymond J. Kenney, Jr., Boston, with him), *for plaintiff.*

THOMAS A. BARNICO, Asst. Atty. Gen., *for Com'r of Ins.*

WILKINS, *Justice.*

Pursuant to G.L. c. 175, § 5 (1992 ed.), the plaintiff (Propac) appealed from the revocation by the defendant Commissioner of Insurance (commissioner) of its license as attorney-in-fact for Massachusetts Employers Insurance Exchange

(Exchange), a reciprocal insurance exchange (see G.L. c. 175, §§ 94A-94M [1992 ed.]) that provides workers' compensation insurance to its employer subscribers. A single justice of this court considered the case on the complaint, the answer, memoranda, and argument of counsel, and without opinion denied the petition under G.L. c. 175, § 5. Propac appeals.

On Friday, December 31, 1993, the commissioner revoked Propac's license without a hearing, effective immediately. The commissioner's notice of revocation of the license was based on the decision in the Superior Court action brought by members of the Exchange and others against Propac. That decision is the subject of our opinion, released today, in Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., 420 Mass. 39, 648 N.E.2d 435 (1995).

The commissioner stated in her revocation notice that, on December 9, 1988, Propac had been licensed to execute contracts of reciprocal or inter-insurance for the Exchange's subscribers and that on that date Propac and the Exchange, through its board of advisors, had entered into a management services (or attorney-in-fact) contract. The commissioner noted that in December, 1992, the Exchange, through its board of advisors, had given notice of termination of the attorney-in-fact agreement, effective December 31, 1993, and that on December 17, 1993, she had licensed another entity to act as the Exchange's attorney-in-fact, effective January 1, 1994.

The commissioner's revocation notice continued:

> "Propac's legal relationship with [the Exchange] and its subscribers is thus terminated on December 31, 1993, rendering impossible Propac's performance of the duties of [attorney-in-fact] for [the Exchange] as contemplated by the license granted to [the Exchange] on December 9, 1988. The court's findings and rulings are clear and mean that Propac has no exchange with which to do business after the December 31, 1993 termination date. Also, because it is not itself an insurer within the meaning of c. 175, it cannot provide the necessary and

> promised coverage to [the Exchange] subscribers it would purport to represent as [attorney-in-fact]. Thus, Propac's license, which is particular to [the Exchange], does not authorize Propac to do the business of [attorney-in-fact] for [the Exchange], because Propac, after December 31, 1993, will have no legal relationship with [the Exchange] or its subscribers."

The commissioner added that "in a meeting held at the Executive Office of Consumer Affairs on December 30, 1993, immediately following the issuance of the Superior Court's decision, Propac indicated to me that it would pursue continued [attorney-in-fact] business with [the Exchange] after December 31, 1993, servicing subscribers it claims to represent because Propac still holds a valid license."

The commissioner continued her discussion of the circumstances as follows:

> "The Division of Insurance has received numerous inquiries from anxious [Exchange] subscribers who have expressed confusion about their workers' compensation insurance contract renewals and concern about the future of that coverage and of the Exchange itself. Propac's conduct clearly indicates that there will be no smooth transition to a new [attorney-in-fact]. Rather, Propac's posture threatens the stability of the Exchange. The subscribers' coverage is jeopardized and may result in financial liability to the subscribers and a disruption in services and benefits of injured workers to whom the Exchange is obligated. I have grave concerns about the ability of [the Exchange] to conduct its business as an exchange after December 31, 1993 because control and possession of the Exchange's assets, claims files and other financial and administrative materials improperly rests, especially in light of the court's decision, with Propac. Propac's expressed intention to continue to act as [the Exchange's attorney-in-fact] after December 31, 1993, is indicative of Propac's intention not to partici-

> pate in the orderly transition by [the Exchange] to a new [attorney-in-fact]."

The commissioner concluded: "Propac has engaged, and has indicated its intent to continue to engage, in conduct which renders its further transaction of business hazardous to the public and the subscribers of [the Exchange]. G.L. c. 175, s. 5 and s. 94F require me to revoke a company's license when these grounds are demonstrated."

The license was revoked effective immediately. Notice of the revocation was sent that day by registered mail to Propac. This action was commenced eleven days later.

1. We consider first Propac's argument that the commissioner lacked authority under G.L. c. 175, § 94F, to revoke its license, and that certainly the commissioner could not lawfully revoke that license without a hearing.

The commissioner, if satisfied that the conditions for the issuance of a license have been met, must issue a license to transact business to an attorney-in-fact, authorizing the attorney-in-fact to execute for the subscribers such contracts of reciprocal or inter-insurance as G.L. c. 175 authorizes. G.L. c. 175, § 94F. The license issued to the attorney-in-fact "shall be subject to section five" of G.L.c. 175. Id. Section 5, which concerns the revocation or suspension of licenses and does not provide for a prerevocation agency hearing, by its terms applies only to a foreign company, that is, one formed by authority of another State or country (G.L. c. 175, § 1 [1992 ed.]). An attorney-in-fact, however, need not be a company formed elsewhere. See G.L. c. 175, § 94A, defining "Attorney in fact" as "an individual, partnership or corporation." An attorney-in-fact may also be domestic. Cf. G.L. c. 175, § 94B ("The principal office of the attorney in fact shall be maintained at such place as is designated by the subscribers in the power of attorney").

Because the Legislature has directed that each license of an attorney-in-fact is subject to § 5, we do not hesitate to apply § 5 to all attorneys-in-fact licensed pursuant to § 94F, includ-

ing an attorney-in-fact that is not a foreign company. It is not reasonable to conclude that its reference to § 5 was designed to authorize the suspension or revocation of the license of only those attorneys-in-fact that happen to be foreign companies. Section 94F concerns all licenses of attorneys-in-fact issued under that section. The commissioner, therefore, acted properly in relying on § 5 to revoke Propac's license.

Propac argues next that, in any event and quite apart from § 5, the State Administrative Procedure Act (G.L. c. 30A [1992 ed.]) provides that Propac's license could not properly be revoked without first offering it a hearing. Section 13 of G.L. c. 30A provides that "[e]xcept as otherwise provided in this section, no agency shall revoke . . . any license unless it has first afforded the licensee an opportunity for hearing in conformity with" certain sections of G.L. c. 30A. Among the circumstances to which the hearing requirement does not apply is the "revocation of the license of a foreign insurance company by [the] commissioner under authority of [G.L. c. 175, § 5]," if the revocation is on the ground, among other things, that the company's "condition or management is such as to render its further transaction of business hazardous to the public or its policyholders." For the reasons that we have already stated in concluding that § 5 applies to Propac, we conclude that the exemption stated in G.L. c. 30A, § 13, applies to all license revocations of attorneys-in-fact licensed under G.L. c. 175, § 94F. Therefore, G.L. c. 30A, § 13, did not require a prerevocation agency hearing in this case.

2. Propac next argues that, if G.L. c. 175, § 5, applies to the revocation of its license and the statutes permit the commissioner to act without a prerevocation hearing, § 5 violates its right to due process of law under the State and Federal Constitutions. Section 5 does not provide for a prerevocation hearing, but only for notice of the revocation. It further provides the right, within ten days of the effective date of the revocation, to petition a single justice of this court, as Propac did, for a summary hearing and review of the action of the commissioner.

We need not determine whether § 5 meets constitutional due process requirements by furnishing an aggrieved licensee only a summary judicial hearing after the revocation of its license. Propac had already had a judicial hearing in the Superior Court concerning the circumstances on which the commissioner based her revocation decision. See Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., supra at 39, 648 N.E.2d 435. On principles of collateral estoppel, Propac was bound by the findings of fact in the Superior Court case even if the Superior Court judgment was on appeal. Certainly due process of law principles did not entitle Propac to two hearings. See Brunson v. Wall, 405 Mass. 446, 449-451, 541 N.E.2d 338 (1989); Haran v. Board of Registration in Medicine, 398 Mass. 571, 575-581, 500 N.E.2d 268 (1986). Cf. Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 382 Mass. 580, 589-590, 416 N.E.2d 1373 (1981) (revocation of motor vehicle license); Almeida v. Lucey, 372 F.Supp. 109, 112 (D.Mass.) (same), aff'd, 419 U.S. 806, 95 S.Ct. 22, 42 L.Ed.2d 36 (1974).

The commissioner did not deny Propac's right to due process of law nor did she act arbitrarily or capriciously in revoking Propac's license. The commissioner properly relied on the findings and rulings that the trial judge had made, and that we have now upheld, in Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., supra.

Finally, Propac complains that it did not receive notice of the revocation of its license before the revocation was purportedly effective. In the case of a revocation on the ground that a company violated a provision of law or failed to comply with its charter, the revocation may not be effective in less than ten days from the date of issue of the notice. G.L. c. 175, § 5. Revocations for other reasons stated in § 5, including the reason in this case ("its condition or management is such as to render its further transaction of business hazardous to the public or its policyholders"), have no such time limitation. We see no reason why, in such a case, the commissioner cannot properly announce that the "license is revoked

effective immediately." Nor do we see any reason to declare the revocation invalid, even if immediate revocation were not authorized. Propac received the notice within three days on Monday, January 3, and we are not concerned with events between the date of the revocation and January 3.

We affirm the order of March 29, 1994, denying Propac's petition (which we construe as a judgment affirming the revocation of the attorney-in-fact license of Propac-Mass, Inc.).[1]

So ordered.

---

[1] Propac's complaint in its heading stated that it contained a request for declaratory relief, but no such request appears in the body of the complaint. Therefore, although the single justice denied the request for declaratory relief, we do not direct that a declaration of rights be included in a new judgment.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
SUFFOLK, SS.

No. 94-013

PROPAC-MASS, INC.

vs.

COMMISSIONER OF INSURANCE, LINDA RUTHARDT

AMENDED ORDER

This matter came before the Court, Lynch, J., presiding, on a petition under G. L. c. 175, sec. 5 and request for declaratory relief. There was argument by counsel for the parties and upon consideration thereof, it is ORDERED that the petition under G. L. c. 175, sec. 5 and the request for declaratory relief be, and the same hereby is, denied.

By the Court, (Lynch, J.)

[ILLEGIBLE]
Assistant Clerk

Entered: March 29, 1994

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
SUFFOLK, SS.

NO. SJ-94-0013

PROPAC-MASS, INC.

v.

COMMISSIONER OF INSURANCE, LINDA RUTHARDT

ORDER

This matter came before the Court, Lynch, J., on a petition requesting declaratory relief pursuant to G.L. c. 175, sec. 5. There was argument by counsel for the parties and upon consideration thereof, it is ORDERED that the petition be, and the same hereby is, denied.

By the Court, (Lynch, J.)

[ILLEGIBLE]
Assistant Clerk

Entered: March 14, 1994

APPENDIX D

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF CONSUMER AFFAIRS
DIVISION OF INSURANCE
470 ATLANTIC AVENUE
BOSTON, MA 02210-2208
(617) 521-7794

PRISCILLA H. DOUGLAS
SECRETARY
LINDA RUTHARDT
COMMISSIONER

Lena Chang, President
Propac-Mass., Inc.
255 Washington Street
Newton, MA 02762

BY REGISTERED MAIL

NOTICE OF REVOCATION OF LICENSE
DOCKET E93-21

FACTS

On December 9, 1988, the Commissioner of Insurance ("Commissioner") issued a license to Propac-Mass, Inc. ("Propac") to "execute contracts of reciprocal or inter-insurance for the subscribers of [the Massachusetts Employers Insurance Exchange]" ("MEIE", the "Exchange"). Pursuant to the provisions of G.L. c. 175, s. 94F, Propac's license is subject to provisions of G.L. c. 175, a.5.

Also on December 9, 1988, Propac and MEIE, through its Board of Advisors (the "Board") entered into a management services contract (the "agreement"). Among its provisions, the agreement contained procedures for the termination of the agreement at the end of its initial five-year term. In December, 1992, by vote of its duly constituted and authorized

Board. MEIE gave notice of termination of the AIF agreement to Propac, in accordance with the terms of the agreement, to take effect on December 31, 1993. On December 17, 1993, upon application and examination, the Commissioner issued a license to MEIE-AIF, Inc. to act as MEIE's attorney-in-fact ("AIF"), effective January 1, 1994.

Under the terms of the AIF agreement, once the notice of termination was given by MEIE, Propac was required to cooperate in an orderly transition to a new AIF. Citing Propac's refusal to extend such cooperation, MEIE sued Propac in the Superior Court of the Commonwealth, seeking essentially injunctive relief and specific performance of the terms of the AIF agreement by Propac. The Superior Court issued its decision on December 30, 1993 attached hereto as Exhibit A. (the "decision")

DISCUSSION

The Superior Court found that MEIE's Board has the power "to set the terms of the termination of the attorney-in-fact" and that through the bargained-for AIF agreement, the Exchange and Propac had done so in "unambiguous terms." The court ruled that the termination of the attorney-in-fact agreement with Propac by MEIE's Board has effect (on the termination date, December 31, 1993), and that G.L. c. 175, s. 94K, the agreement, the by-laws, *the license granted to the attorney-in-fact* (emphasis added), the certificate of authority to conduct business granted to the Exchange and the power of attorney "[are] instruments integrated with each other forming one transaction governed by the statute, c. 175, ss. 94A-94M."

Propac's legal relationship with MEIE and its subscribers is thus terminated on December 31, 1993, rendering impossible Propac's performance of the duties of AIF for MEIE as contemplated by the license granted to MEIE on December 9, 1988. The court's findings and rulings are clear and mean that Propac has no exchange with which to do business after the December 31, 1993 termination date. Also, because it is not

itself an insurer within the meaning of c. 175, it cannot provide the necessary and promised coverage to MEIE subscribers it would purport to represent as AIF. Thus, Propac's license, which is particular to MEIE, does not authorize Propac to do the business of AIF for MEIE, because Propac, after December 31, 1993, will have no legal relationship with MEIE or its subscribers.

In its unambiguous decision, the court found that Propac "did not accept its notice of termination . . . [i]t challenged the Exchange's authority to terminate its AIF. Propac removed files to another location without notice to the Exchange. Propac informed the Exchange on November 15, 1993, that it was vacting the Exchange's principal office. Propac informed AIM subscribers that their worker's compensation insurance would be jeopardized if they signed a new Power of Attorney appointing a different AIF. Propac instructed AIM subscribers to pay premiums to it instead of to the Exchange. Propac conducted a campaign to solicit AIM subscribers for its own account. Propac, in sum, challenged AIM in the marketplace and in the courtroom."

Moreover, the court found that Propac refused to cooperate with the Exchange in an orderly transition to a new attorney-in-fact and that Propac engaged in "a campaign to retain office in breach of a covenant, fairly read, that permits the "Exchange, without cause, to terminate it." The court ruled that Propac "is in violation of its covenant, implied in the agreement, of good faith and fair dealing," and further ruled that "Propac's conduct constitutes unfair acts of practices in violation of [G.L.] c.93A."

Despite the court's finding that Propac's license cannot be viewed in isolation of the Exchange's other governing documents, including the AIF agreement which terminates on December 31, 1993, in a meeting held at the Executive Office of Consumer Affairs on December 30, 1993, immediately following the issuance of the Superior Court's decision, Propac indicated to me that it would pursue continued AIF business with MEIE after December 31, 1993, servicing subscribers it claims to represent, because Propac still holds a valid license.

The Division of Insurance has received numerous inquiries from anxious MEIE subscribers who have expressed confusion about their workers' compensation insurance contract renewals and concern about the future of that coverage and of the Exchange itself. Propac's conduct clearly indicates that there will be no smooth transition to a new AIF. Rather, Propac's posture threatens the stability of the Exchange. The subscribers' coverage is jeopardized and may result in financial liability to the subscribers and a disruption in services and benefits of injured workers to whom the Exchange is obligated. I have grave concerns about the ability of MEIE to conduct its business as an exchange after December 31, 1993 because control and possession of the Exchange's assets, claims files and other financial and administrative materials improperly rests, especially in light of the court's decision, with Propac. Propac's expressed intention to continue to act as the MEIE's AIF after December 31, 1993, is indicative of Propac's intention not to participate in the orderly transition by MEIE to a new AIF.

ORDER

Accordingly, I find, on the basis of the evidence submitted to me as aforesaid, that Propac has engaged, and has indicated its intent to continue to engage, in conduct which renders its further transaction of business hazardous to the public and the subscribers of MEIE, G.L. c. 175, s. 5 and s. 94F require me to revoke a company's license when these grounds are demonstrated.

Further, as found by the court, Propac has consistently failed to recognize the Board's authority over the Exchange (authority which the court has clearly ruled the Board has), holding itself out to subscribers and to the public as the Exchange or its management and preventing the Board from managing the Exchange. Therefore, the hazard to the public and to the subscribers of MEIE is caused not by the Exchange through its Board, but by the conduct of Propac as "administrative management" of the Exchange.

Based upon all the evidence to me as aforesaid, in accordance with the provisions of G.L. c. 175, s. 5 and s. 94F, it is hereby ordered that Propac's license is revoked, effective immediately. Propac's failure to conduct itself in a professional and reasonable manner so as to result in an orderly transition to a new AIF will subject Propac to possible civil and other prosecution permitted by the laws of the Commonwealth of Massachusetts.

/s/ LINDA RUTHARDT
Linda Ruthardt
Commission of Insurance
December 31, 1993

In accordance with the provisions of G.L. c. 175, s. 5, if it is aggrieved by this revocation. Propac's remedy lies in a petition to the Supreme Judicial Court.

cc: Propac-Mass, Inc.
155 Maple Street, Springfield, MA 01105
13 Roszel Road, Princeton, NJ 08540

Robert A. LaRosa, Chairman
Board of Advisors, MEIE

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF CONSUMER AFFAIRS
DIVISION OF INSURANCE
470 ATLANTIC AVENUE
BOSTON, MA 02210-2208
(617) 521-7794

PRISCILLA H. DOUGLAS
SECRETARY
LINDA RUTHARDT
COMMISSIONER

AFFIDAVIT OF SERVICE

Pursuant to G.L. c. 175, secs. 5, 94F. I hereby certify that on this date the Notice of Revocation of License, Division of Insurance Docket No. E93-21, has been served upon PROPAC-MASS, Inc., by registered mail, postage prepaid, at its office addresses at 255 Washington Street, Newton, Massachusetts 02762; 155 Maple Street, Suite 305, Springfield, Massachusetts 01105; and 13 Roszel Road, Princeton New Jersey, 08540.

Dated: December 31, 1993

/s/ LINDA RUTHARDT
Linda Ruthardt
Commissioner of Insurance

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT

Civil Action No. 93-4987-G

MASSACHUSETTS EMPLOYERS INSURANCE EXCHANGE, and ASSOCIATED INDUSTRIES OF MASSACHUSETTS, INC., ATCO PLASTICS, INC. and HUMBOLDT STORAGE & MOVING CO. as representative members of the MASSACHUSETTS EMPLOYERS INSURANCE EXCHANGE,

Plaintiffs,

—vs.—

PROPAC-MASS, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

We are asked to determine that defendant, Propac-Mass., Inc., ("Propac"), breached its Attorney-In-Fact Agreement ["the agreement"], with the Massaschusetts Employers Insurance Exchange, an unincorporated association of individual subscribers conducting business as a domestic reciprocal insurance exchange created under G.L. c. 175 §§ 94A-94M at 222 Berkeley Street, Boston ("the Exchange"); that Propac violated its implied covenant in the agreement of good faith and fair dealing; and that as a consequence Propac violated G.L. c. 93A, §§ 2 and 11. As their remedy, the Exchange seeks a mandatory injunction ordering Propac to comply with

Paragraph 16 of the agreement, essentially covenants requiring Propac, on notice of termination, to perform tasks and to behave in a manner to insure an orderly transition so that Propac's successor may be in position on January 1, 1994 to exercise its responsibilities on that date pursuant to its Attorney-in-Fact Agreement with the Exchange. Lastly, the Exchange requests a reasonable attorney's fee and expenses. Propac denies that it has been terminated as the Attorney-in-Fact for the subscribers of the Exchange and therefore denies that it is in breach of the agreement. Propac asks that the complaint be dismissed and for its counsel fees and expenses. The matter was tried to the court on the merits on December 2, 3, 6, 7, 8 and 14, 1993. The Court heard ten witnesses and received 64 exhibits in evidence. After consideration, the Court finds and rules as follows:

FINDINGS OF FACT

We begin with the year 1984. In that year and continuing through 1988, the Associated Industries of Massachusetts, Inc. ("AIM"), a trade association of Massachusetts businesses conducting its affairs as a not for profit Massachusetts corporation, sponsored a workers' compensation group insurance program for its members. That program, in which more than 300 AIM members were enrolled, was underwritten by Liberty Mutual Insurance Company. On January 22, 1988, Liberty Mutual, deciding to withdraw its participation, notified AIM that effective January 1, 1989, it would no longer continue to underwrite the program. At that point, Robert LaRosa, an Executive Vice-President of AIM, sought to establish a group self-insurer program. His efforts, however, proved fruitless and soon were abandoned. LaRosa then turned to Dr. Lena Chang, Dr. Chang, trained as mathematician, had been a consultant to AIM on workers' compensation matters. She also had served in Massachusetts on a Governor's Task Force dealing with insurance issues. Her husband, James Sheeran, Esq., a former Commissioner of Insurance in

the State of New Jersey, had participated in insurance related businesses principally in New Jersey and had experience with a reciprocal insurance exchange. By letter dated June 2, 1988, Dr. Chang proposed that AIM sponsor such an exchange to provide workers' compensation insurance to AIM members.

At this point, we interrupt our narrative to describe the nature of such an exchange. A creature of statute, an exchange as a generic notion is

> "a system of insurance under which several individuals may underwrite each other's risks against various hazards through an attorney-in-fact common to all, under an agreement that each underwriter acts separately and severally and not jointly with any other. All the subscribers are insured and at the same time are insurers. The insurance exchange thus formed has no corporate existence, but is an unincorporated association of individual subscribers. The attorney-in-fact represents each subscriber individually in exchanging insurance with others and is authorized to do every act that the subscriber could do in relation to the common enterprise. None of the members or subscribers to an insurance exchange deal directly with each other. All exchanges of insurance are effected through the common representative—the common attorney-in-fact. The subscriber pays a premium or membership fee to the exchange. From the premium a fixed percentage is deducted as the attorney-in-fact's fee." *In Re International Re-Insurance Corp.*, 32 Del. Ch. 28, 32, 78A 2d 744 (1951), *affirmed*, 86A 2d 647 (1952).

Returning to our account, on June 10, 1988, AIM undertook sponsorship by providing a subordinated loan of $200,000 to an exchange to serve as initial surplus. On August 3, 1988, Propac was incorporated under Massachusetts law. Mr. Sheeran and Dr. Chang, its two stockholders, became President and Vice-President, respectively. On August 9, 1988, pursuant to § 94C, AIM, and five of its members, applied to

the Commissioner of Insurance for a preliminary certificate to solicit subscribers. AIM designated Propac as its representative to meet with representatives of the Division of Insurance. On August 24, 1988, a preliminary certificate was issued by the Commissioner. Personnel of the Exchange, with the assistance of Propac employees and materials, then began to solicit AIM members for membership in the Exchange. By October 19, 1988, 63 persons had subscribed to the Exchange. On that date, the Exchange, through Propac, applied for a provisional certificate of authority to conduct business. The Exchange's filing included a form of power of attorney drafted by Propac to be executed by each subscriber, and bylaws, also prepared by Propac, to govern the Exchange. On December 9, 1988 the Commissioner issued a provisional certificate to the Exchange and a license to Propac authorizing Propac to execute reciprocal contracts of insurance in the subscriber's name. Under that date, Propac and the Exchange signed the agreement.[1] The agreement, effective January 1, 1989, was based on a form of contract employed by Mr. Sheeran in the past and refashioned in part, principally paragraph 17, termination for cause, by counsel for AIM, before being signed by the parties. I find that the provisional certificate, the license to Propac and the attorney-in-fact agreement were a part of and formed one contemporaneous transaction. The Exchange began operation on January 1, 1989 and has continued to function to date. The Exchange now has 819 subscribers.

On December 1, 1992, the Board of Advisors met and after hearing Dr. Chang and Mr. Sheeran voted to terminate the agreement. By letter dated December 4, 1992, the Board, through LaRosa, informed Propac that "it [was] terminating the [agreement] on the completion of the five year term, ending December 31, 1993." The Board elected to terminate

---

[1] The agreement was signed by LaRosa and Ralph P. Schlenker, two of the three members of the Board of Advisors on behalf of the Exchange and by Mr. Sheeran on behalf of Propac.

under paragraph 16, the so-called "no cause termination provision", about which we will comment later.

In view of a Propac challenge to the validity of the Exchange's action in terminating the agreement because of the claimed legal infirmity of the Board of Advisors to do what it purported to do, we detour to discuss the establishment of the Board and its composition.

G.L. c. 175, § 94K provides in part that an

> "Advisory Committee or other similar Committee or board composed of not less than three subscribers, shall be elected or appointed by each exchange in the manner provided by the power of attorney which Committee or board shall have the authority and duties provided therein."

The power of attorney here, however, is silent on the subject of a board of advisors. The function of the Board is addressed in Art. VIII, § 1 of the Exchange which provides that "The business and affairs of the Exchange, subject to the contract with the Attorney-in-Fact, shall be under the advice and direction of the board of advisors." We shall return to that subject.

We turn next to the composition of the Board. The original members of the Board assumed their office in October, 1988 and consisted of Messrs. LaRosa and Schlenker and one Droukas. On May 7, 1991, at the second annual meeting of the subscribers, all subscribers present voted to expand membership on the Board to five, to reelect Schlenker to a three year term and to elect John Gould and Michael J. Riley to the Board. Those gentlemen with LaRosa and Droukas, whose initial terms had not expired, constituted the five person board. However, a quorum of subscribers was not present at the meeting. At the Exchange's third annual meeting on May 5, 1992, by unanimous vote, LaRosa was reelected and one Jorjorian elected to replace Droukas. Again, a quorum was not present. After this litigation was filed, by unanimous consent on November 4, 1993, the Board voted to ratify its action in

expanding its membership to five and in appointing Messrs. Gould, Riley and Jorjorian as members. The following day, November 5, 1993, by unanimous consent, the Board ratified its December 1, 1992 termination of the agreement.

Our detour complete, we return to our principal account. On July 27, 1993, the Board by letter reminded Propac of its obligation to facilitate an orderly transition of its services. Propac, however, did not accept its notice of termination. Rather than cooperating with the Exchange to insure an orderly and peaceful transition, it challenged the Exchange's authority to terminate it as attorney-in-fact. Propac removed files to another location without notice to the Exchange. Propac informed the Exchange on November 15, 1993 that it was vacating the Exchange's principal office. Propac informed AIM subscribers that their workers' compensation insurance would be jeopardized if they signed a new power of attorney appointing a different attorney-in-fact. Propac instructed AIM subscribers to pay premiums to it instead of the Exchange. Propac conducted a campaign to solicit AIM subscribers for its own account. Propac, in sum, challenged AIM in the marketplace and in the courtroom.

We turn now to our conclusions of law.

CONCLUSIONS OF LAW

THRESHOLD

This lawsuit is brought by Associated Industries of Massachusetts, Inc., ATCO Plastics, Inc. and Humboldt Storage & Moving Co. as representative members of the Exchange under Mass. R. Civ. P. 23.2. Defendant submits that the Exchange, as an unincorporated association, may not be a party to this litigation and that as "no subscriber may act to revoke or affect another subscriber's power of attorney or contract of insurance"; no named plaintiff is a representative subscriber. *Defendant's Proposed Rulings of Law* at 8-9. It appears that under Massachusetts law an unincorporated asso-

ciation is not a legal entity and thus may not be party to a lawsuit. *Harvard Square Defense Fund, Inc.* v. *Planning Board of Cambridge*, 27 Mass. App. Ct. 491, 496 n.9 (1989). Rule 23.2 permits an action by "members of an unincorporated association as a class by naming certain members as representative parties [to] be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members." Simply put, the question is will the named plaintiffs fairly and adequately protect the interests of the subscribers? *Management Television Systems, Inc.* v. *The National Football League, et. al.*, 52 F.R.D. 162, 164 (E.D. PA. 1971). The named plaintiffs are longstanding subscribers to the Exchange, and share the interest that control of the Exchange remain with the subscribers through the Board of Advisors. As a consequence of this finding, the court rules that they are representative members of the Exchange and are entitled to prosecute this action against this defendant on behalf of the Exchange and their individual subscribers. *Cheever* v. *Graves*, 32 Mass. App. Ct. 601, 604-605 (1992).

Propac argues that the notice of termination was without legal effect because the Board was without authority to act on behalf of the Exchange. Propac's argument is bottomed on the circumstance that the members of the Board of Advisors on date of the notice of termination, were without authority to hold office. Propac's ground is that the members were elected at meetings of the subscribers which did not contain a quorum. Plaintiffs contend that Propac is without standing to make that argument; that Propac "may not be heard to challenge matters relating to" the Exchange's governance. The court adopts plaintiffs' view. *See Bello* v. *South Shore Hospital*, 384 Mass. 770 (1981); *Council of Jewish Women* v. *Boston Section Council of Jewish Women*, 212 Mass. 219 (1912). Moreover, the board members in voting to terminate the agreement purported to exercise the powers of their office and may be perceived as *de facto* board members. No third person may "collaterally show the illegality of the election of

the *de facto* [directors], where no other persons are claiming a right to act as directors, and the incumbents are exercising the usual functions of the office."[2] *Stratton-Massachusetts Gold Minds Co.* v. *Davis*, 222 Mass. 549, 553 (1916). Finally, Propac having received the benefits of the agreement since January 1, 1989, may not now claim that the notice of the termination was *ultra vires*. "It is well settled in the Commonwealth that a defendant in a contract action cannot use an ultra vires defense when the defendant has received the benefit of the bargain." *Valley Stream Teachers Federal Credit Union* v. *The Commissioner of Banks*, 376 Mass. 845, 856 (1978). *See also Williston On Contracts*, Vol. 2. at 474 n. 17 (3rd ed. 1959 & Supp. 1993). "[O]ne who Contracts with an association as a legal entity and capable of transacting business and receives money or other valuable consideration therefrom may not deny the validity of the contract on the ground that the association has no legal existence." The court rules that Propac may not challenge the legal effectiveness of the notice of termination on the ground that the members of the Board of Advisors were without authority to execute and deliver that notice.

MERITS

We begin with four statutory definitions.

> " 'Attorney in Fact' [a] . . . . . corporation acting under power of attorney as the representative of the subscribers in the exchange of reciprocal or inter-insurance contracts and matters incident thereto
>
> " 'Subscribers', the participants or policy holders, who have given to an attorney in fact a power of attorney giving authority to obligate them separately and severally,

---

[2] There was no evidence that Mr. Sheeran and Dr. Chang, or either, were aware at any time prior to the filing of this lawsuit that Board members were without legal authority to hold their office.

> as specified therein, in the exchange of reciprocal or inter-insurance contracts.
>
> " 'Exchange', an aggregation of individuals, partnerships or corporations, herein called subscribers, who or which, under a common name, exchange contracts of insurance on the reciprocal or inter-insurance plan through the office of an attorney in fact, being the place where contracts of insurance are issued." G.L. c. 175 § 94A.

Propac argues that the notice of termination given under paragraph 16 of the agreement is without legal effect because that paragraph by its terms does not provide that the Board of Advisors may give such notice. Propac, in support of its contention, points to the language of paragraph 17, the provision governing termination of the agreement prior to its term for good cause, where the Board of Advisors explicitly is the agent through which termination is triggered.[3] Hence Propac argues that as paragraph 16 did not give the Board of Advisors a role in terminating the agreement, the Board had no authority to give the challenged notice. Paragraph 16 of the agreement provides that:

> "Upon execution, this Agreement shall be effective for a term of five (5) years from the Anniversary Date and shall continue from year to year thereafter, unless terminated by either party on the fifth year, by one years prior written notice, or at any subsequent Anniversary Date by written notice to the other given at least one (1) year prior to said Anniversary Date.

---

[3] "Termination for Good Cause shall only be made by a decision of the full Advisory Committee of the Exchange after providing the AIF a full hearing before the Committee, after ten (10) days advance written notice of the meeting, which states that among its purposes is consideration of terminating this Agreement for Good Cause. . . . . .

"In the event that the Advisory Committee decides to terminate the agreement under this section, AIF shall first have the right to require that the matter be submitted to arbitration pursuant to the provisions of § 21 of this agreement."

> In the event that either party gives such notice of termination, the Exchange shall have the right, during the year preceding the termination date, to make any and all arrangements necessary or desirable, in its discretion and at its cost and with no reduction of [Propac's] fee, to provide for personnel and facilities for the performance of the service performed by [Propac] under this Agreement and [Propac] will cooperate with the Exchange toward the end that there will be an orderly transfer of management services functions, in respect to the Exchange's business, from [Propac] to the Exchange or its designee. As used herein "Anniversary Date" means the first day of the first calendar month in which insurance is bound or policies are issued by the Exchange."

In response, plaintiffs contend that the agreement must be enforced according to its terms citing *BayBank Middlesex* v. *1200 Beacon Properties, Inc.*, 760 F. Supp. 957, 963 (D. Mass. 1991), and *Freelander* v. *G. & K. Realty Corp.*, 357 Mass. 512, 516 (1970). Plaintiffs also argue that Propac may not now be heard to challenge matters relating to the Exchange's internal governance citing *Bello* v. *South Shore Hospital, supra.*, and that Propac, having dealt with the Exchange as an entity capable of conducting business, is now estopped from denying the Exchange's right, either to contract with it, or to enforce notice of termination under paragraph 16. *State Farm Mutual Automobile Ins. Co.*, v. *MacKechnie*, 114 F.2d 728, 735 (8th Cir. 1940).

The court rejects Propac's position as untenable. Paragraph 16 provides for termination by either *party*, without reason, at the time and in the manner provided, after an initial period of five years, presumably the agreed upon period to permit Propac to realize the benefit of its investment. Propac's position, if adopted, would eliminate paragraph 16 from the agreement. The Exchange, having placed direction of its affairs, subject to the agreement, in the Board of Advisors, would be powerless to act. The logic of Propac's position would result

in an attorney-in-fact removable by the Exchange only for good cause. That is not what the agreement provides. The language of paragraph 16 is not to be read out of the agreement. The court therefore rejects Propac's contention on this ground and rules that the notice of termination dated December 4, 1992, is a notice of termination by a "party" within the meaning of paragraph 16 of the agreement.

Having ruled that paragraph 16 of the agreement has force, and termination under it effect, the court now turns to Propac's essential position: The Exchange is a creature of statute; section 94K mandates a Board of Advisors "which . . . shall have the authority and duties provided" in the power of attorney. The power of attorney given by the subscribers, however, does not so provide. It is silent on that issue. It does provide, para. 12, that it "may be terminated at any time by the Subscriber, or by the Attorney-in-Fact, by the termination of all insurance contracts of Subscriber to which [the power of attorney] applies subject to" law and regulation. Therefore, Propac's reasons, the attorney-in-fact only may be terminated by the subscriber. And this conclusion makes sense, Propac argues, because it holds a fiduciary duty, which is not discharged unless and until the subscriber terminates the relationship.

The court disagrees. It does not view § 94K, the agreement, the bylaws, the license granted to the attorney-in-fact, the certificate of authority to conduct business granted to the Exchange and the power of attorney in isolation; rather, it perceives each such document as instruments integrated with each other forming one transaction governed by the statute, c. 175, §§ 94A-94M.

Art. VIII § 1 of the bylaws states that "The business and affairs of the Exchange subject to the contract with the Attorney-in-Fact, shall be under the advice and direction of the Board of Advisors." Considering that the agreement spells outs that the array of services Propac agreed to perform for a fee, see para. 5, this provision of the by-law is another formulation of the principle that the "attorney-in-fact has power

to administer the day to day operation of the reciprocal insurer such as keeping the books, executing policies of insurance, investigating claims and receiving service of process. [But the] ultimate power and responsibility of the management and control of the reciprocal insurer rests with the Advisory Committee." *Lumberman's Underwriting Alliance* v. *Corcoran*, 479 N.Y.S. 2d. 797, 798 (Supr. Ct. App. Div. N.Y. 1984). The license issued by the Commissioner authorizes Propac, "as attorney in fact for [the Exchange] . . . . to execute the contracts of reciprocal or inter-insurance for the subscribers of [the Exchange.]." Art. II § 2, of the by-laws is the place where the subscriber, the attorney-in-fact, and the Exchange intersect. It states that "[e]ach applicant for membership in the Exchange shall execute a power of attorney which shall be in such form as the board of Advisors shall prescribe, and every member, by virtue of his status as an insured, shall thereby adopt the then existing power of attorney and these By-laws and shall thereby authorize the Attorney-in-Fact to act in accordance *therewith*." (Emphasis supplied). As the "constitution and bylaws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members . . .", *Polin* v. *Kaplan*, 257 N.Y. 277 cited in *Williston On Contracts*, 3rd ed. Vol. 2, 308, "the bylaws of [the Exchange] are a contract between [the Exchange and the members of the Exchange] (citations omitted)." *Jessie* v. *Boynton*, 372 Mass. 293, 303 (1977). The subscriber thus agreed with the Exchange to adopt (1) the existing power of attorney (2) the bylaws and (3) to authorize Propac to act in accordance with the power of attorney *and* the bylaws. Propac by entering into an agreement with the Exchange contracted with the Exchange to do so; that is, the agreement, assigning to Propac for a fee the power of day to day administrative management, is consistent with, and in contemplation of, Art. VIII § 1 of the bylaws, which leaves the power to direct the balance of the affairs of the Exchange in the Board of Advisors. And within that residuum of power

is the power to set the terms of termination of the attorney-in-fact. In this case, as the product of bargaining, the Exchange and Propac have done so in unambiguous terms. That the terms of termination are reflected in the agreement, and not in the power of attorney, is of no moment. As stated, the power of attorney, the license, the bylaws, the agreement document one transaction.[4] That the power of attorney may be terminated at any time by a subscriber by the termination of insurance contracts speaks only to that individual subscriber. Paragraph 12 of the power of attorney does not relate to the termination of the attorney-in-fact as it is *common* to all subscribers of the Exchange. That, under the agreement, is left to the Exchange.

We turn now to the other two claims.

" 'Every contract implies good faith and fair dealing between the parties to it'." *Warner Ins. Co.* v. *Commissioner of Ins.*, 406 Mass. 354, 362 n. 9 (1990). "The implied covenant of good faith and fair dealing provides that 'neither party shall do anything that will have the effect of destroying or injuring the right of the other party to recover the fruits of the contract . . . .'." *Anthony's Pier Four, Inc.* v. *H.B.C. Associates*, 411 Mass. 451, 471-472 (1992) (other citations omitted). G.L. c. 93A, § 2(a) condemns " '[u]nfair . . . . acts or practices in the conduct of any trade or commerce.' This prohibition is 'extended to those engaged in trade or commerce in business transactions with others similarly engaged' by G.L. c. 93A, § 11 [citations omitted]. . . . [C]onduct 'in disregard of known contractual arrangements' and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes [citations omitted]." *Id.*, 474.

As an ultimate fact, I find that Propac on notice of termination refused and refuses to cooperate with the Exchange in an orderly transition to a new attorney-in-fact. Rather, Propac engages in a campaign to retain office in breach of a covenant,

---

[4] That being the case, termination under paragraph 16 would not expose Propac to liability to an individual subscriber for violation of fiduciary duty since, as a result, the power of attorney terminates.

fairly read, that permits the Exchange, without cause, to terminate it. This it may not do. I rule that Propac is in violation of its covenant, implied in the agreement, of good faith and fair dealing, and I further rule that Propac's conduct constitutes unfair acts or practices in violation of c. 93A.

The Clerk will set down for hearing plaintiff's application for judgment.

SO ORDERED.

/s/ DAVID M. ROSEMAN
David M. Roseman
Justice of the Superior Court

DATED: December 30, 1993

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPERIOR COURT

Civil Action No. 93-4987-G

MASSACHUSETTS EMPLOYERS INSURANCE EXCHANGE, and Associated Industries of Massachusetts, Inc., ATCO Plastics, Inc. and Humboldt Storage & Moving Co. as representative members of the Massachusetts Employers Insurance Exchange,

Plaintiffs,

—v.—

PROPAC-MASS., INC.,

Defendant.

JUDGMENT

This action came on for trial before this Court, David M. Roseman, Associate Justice, presiding on December 2, 3, 6, 7, 8 and 14, 1993. Thereafter, on December 30, 1993, the Court issued Findings of Fact and Conclusions of Law. The issues having been duly tried and the parties heard,

It is hereby Ordered and Adjudged as follows:

(1) That defendant PROPAC-MASS, Inc. ("PROPAC") has breached the Attorney-in-Fact Agreement (the "AIF Agreement") which it entered into with the Massachusetts Employers Insurance Exchange ("MEIE"), breached its covenant of good faith and fair dealing, implied in the AIF Agreement,

and violated G.L. c. 93A, §§ 2 and 11 by engaging in unfair trade practices;

(2) That the defendant is mandatorily enjoined to comply with the provisions of paragraphs 16 and 18 of the AIF Agreement, this shall include:

a. cooperating with and assisting the new attorney-in-fact of MEIE, MEIE Attorney-In-Fact, Inc. ("MEIE-AIF") in assuming all management service functions, in respect to MEIE's business, previously performed by PROPAC, including issuance of contracts of insurance and their endorsements, underwriting, loss control, premium collection, claim administration and payments, payment of any other liabilities owed, and investment and control of the assets of MEIE; and

b. delivery to MEIE-AIF, at MEIE's reasonable expense, of all records and information in the possession, custody or control of PROPAC concerning the affairs of MEIE.

(3) That, with respect to transfer of control of the assets of MEIE, PROPAC shall execute all documents which may be reasonably required by any bank or other financial services institution in which MEIE's funds are held in custodial, depository or other accounts to transfer control of such accounts to MEIE-AIF by January 11, 1994.

(4) That PROPAC shall complete all other obligations under this Judgment on or before January 11, 1994, or pursuant to such other time table as to which the parties may agree. If another time table is agreed upon by the parties, it shall be filed with this Court as an addendum to this Judgment and become a part hereof; and

(5) That plaintiffs shall submit an affidavit to this Court describing and supporting the reasonable attorneys fees and costs incurred by plaintiffs in prosecuting this action within 14 days. Defendants may file any objections to such sub-

mission within ten days thereafter. The Court will thereafter enter an award of reasonable attorneys fees and costs to plaintiffs and against PROPAC.

Dated at Suffolk County, Commonwealth of Massachusetts, this 6th day of January, 1994.

/s/ DAVID M. ROSEMAN
David M. Roseman, Associate Justice

APPENDIX G

175:5. Foreign companies; revocation of authority; petition for review.

Section 5. If the commissioner is satisfied, upon examination or other evidence submitted to him, that any foreign company is insolvent or is in an unsound financial condition, or that its business policies or methods are unsound or improper, or that its condition or management is such as to render its further transaction of business hazardous to the public or its policyholders, or that it is transacting business fraudulently, or that its officers or agents have refused to submit to an examination under section four or to perform any legal obligation relative thereto or that the amount of its funds, net cash or contingent assets is deficient or that its capital stock or deposit or guaranty capital or guaranty fund is impaired, as set forth in section twenty-three A, or that such capital stock, deposit or guaranty capital or guaranty fund has been reduced below the amount required by section one hundred and fifty-one, he shall revoke the license issued to said company under section one hundred and fifty-one and the licenses issued to all of its agents under this chapter; or, if he is satisfied, as aforesaid, that any foreign company has violated any provision of law or has failed to comply with its charter, he may revoke such licenses or suspend them for a period not exceeding the unexpired terms thereof. He shall give written notice to the company specifying the date on which such revocation or suspension shall be effective, the term of any such suspension and the ground for such revocation or suspension; provided, that if the ground for revocation or suspension is that the company has violated any provision of law or has failed to comply with its charter, the effective date of such revocation or suspension shall be not less than ten days from the date of issue of said notice, and the particulars of such violation or failure to comply with its charter shall be specified in said notice. Such notice may be served by registered mail, sent postage prepaid, addressed to

the company at its last home office address or, in the case of a company described in section one hundred and fifty-five, to its resident manager in the United States at his last address, appearing on the records of the commissioner. An affidavit of the commissioner, in such form as he may prescribe, or of anyone authorized by him to give such notice, appended to a copy thereof, that such notice has been mailed as aforesaid shall be prima facie evidence that such notice has been duly given. He shall also cause notice of such revocation or suspension to be published in such manner as he may deem necessary for the protection of the public. A company aggrieved by a revocation or suspension of its license hereunder, may within ten days from the effective date of such revocation or suspension file a petition in the supreme judicial court for the county of Suffolk for a review of such action of the commissioner. The court shall summarily hear and determine the question whether the ground for revocation or suspension specified in the notice of the commissioner exists and may make any appropriate order or decree. If the order or decree is adverse to the petitioning company it may within ten days therefrom appeal to the full court; and in case of such an appeal the revocation or suspension of the license of the said company shall continue in full force until the final determination of the question by the full court, unless vacated by the commissioner during the pendency of such appeal.

APPENDIX H

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 COURTHOUSE, BOSTON, MASSACHUSETTS 02108
(617) 557-1020

Raymond J. Kenney, Jr., Esquire
Martin, Magnuson, McCarthy & Kenney
101 Merrimac Street
Boston, MA 02114

RE: No. SJC-06610

PROPAC-MASS, INC.

vs.

COMMISSIONER OF INSURANCE

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

/s/ JEAN M. KENNETT
Jean M. Kennett, Clerk

Dated: September 7, 1995

To: Raymond J. Kenney, Jr., Esquire
Thomas A. Barnico, A.A.G.
Daniel Judson, Esquire
Dennis A. Durkin, Esquire

APPENDIX I

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 COURTHOUSE, BOSTON, MASSACHUSETTS 02108
(617) 557-1020

Raymond J. Kenney, Jr., Esquire
Martin, Magnuson, McCarthy & Kenney
101 Merrimac Street
Boston, MA 02114

RE: Docket No. SJC-06610

PROPAC-MASS, INC.

vs.

COMMISSIONER OF INSURANCE

NOTICE OF DOCKET ENTRY

Please take note that on August 10, 1995, the following entry was made on the docket of the above-referenced case:

MOTION of Plaintiff-Movant Propac-Mass, Inc. for Leave to Enlarge Time to File Petition for Rehearing filed. August 29, 1995: Denied by the Court. Notice to Counsel.

Jean M. Kennett, Clerk

Dated: August 29, 1995

To: Raymond J. Kenney, Jr., Esquire
Thomas A. Barnico, A.A.G.
Daniel Judson, Esquire
Dennis A. Durkin, Esquire

FILED
OCT 20 1995

No. 95-487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

PROPAC-MASS, INC.,
Petitioner,

v.

LINDA RUTHARDT, COMMISSIONER OF INSURANCE OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

SCOTT HARSHBARGER
Attorney General
of Massachusetts

THOMAS A. BARNICO*
Assistant Attorney General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

Questions Presented

1. Whether Propac's second petition for a writ of certiorari was timely filed under 28 U.S.C § 2101(c) (1988).

2. Whether the Due Process Clause permits an executive official of a State to revoke the license of an insurance company for hazardous conduct by relying on findings made by a trial court against the same licensee, in the absence of a second hearing by the official.

Table of Contents.

QUESTIONS PRESENTED

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED 4

STATEMENT OF THE CASE 7

REASONS FOR DENYING THE WRIT 8

I. The Petition is Untimely Because No Timely Petition for Rehearing was Filed in the Court Below. 8

II. The Petition Fails to Claim a Conflict in the Courts Below or Present an Issue of National Importance that Merits Review by this Court. 12

III. The Decision Below is Consistent with the Decisions of this Court Under the Due Process Clause. 12

CONCLUSION 17

Table of Authorities.

Cases.

Almeida v. Lucey, 372 F. Supp. 109,
(D. Mass. 1974) (three-judge court),
aff'd, 419 U.S. 806 (1974) 13

Bowman v. Loperena,
311 U.S. 262 (1940) 10

Capital Cities Cable Inc. v. Crisp,
467 U.S. 691 (1984) 17

Credit Company, Limited v. Arkansas Central
Railway Co.,
128 U.S. 258 (1888) 11

Dixon v. Love,
431 U.S. 105 (1997) 13, 16

Joyce v. George W. Prescott Publishing Co.,
352 Mass. 767, 225 N.E.2d 355 (1967) 10

Market Street Railway Co.
v. Railroad Commission of
California,
324 U.S. 548 (1945) 11

Mass. Employers Insurance
Exchange v. Propac-Mass., Inc.,
420 Mass. 39, 648 N.E.2d 435 (1995) 2, 15

Morse v. United States,
270 U.S. 151 (1926) 10

Parratt v. Taylor,
451 U.S. 527 (1981) 13

Pfister v. Finance Corp.,
317 U.S. 144 (1942) 10

Propac-Mass. v. Commissioner of Insurance,
420 Mass. 45, 648 N.E.2d 407 (1995) 2

Sullivan v. Carignan,
733 F.2d 8 (1st Cir. 1984) 14

United States v. Healy,
376 U.S. 75 (1964) 11

In Re Woods, 143 U.S. 202 (1982) 8

Federal Constitutional Provision

U.S. Const., 14th Amendment,
Due Process Clause passim

Federal Statutes

28 U.S.C. § 1257(a) (1988)	3
28 U.S.C. § 2101(c) (1988)	QP

Massachusetts Statutes

G.L. c. 30A, § 10 (West 1992 ed.)	4
G.L. c. 30A, § 11 (West 1992 ed.)	4
G.L. c. 30A, § 12 (West 1992 ed.)	4
G.L. c. 30A, § 13 (West 1992 ed.)	4
G.L. c. 93A (West 1984 ed. and 1995 Supp.)	15
G.L. c. 175, § 5 (West 1987 ed.)	4, 5, 6, 16, 17
G.L. c. 175, § 94F (West 1987 ed.)	6

Miscellaneous

Mass. R. App. P. 23	10
Mass. R. App. P. 27(a)	6, 9

R. Rotunda & J. Nowak,
Treatise on Constitutional Law,
§ 17.8 (2d ed. 1992) 13

Stern, Gressman, Shapiro & Geller,
Supreme Court Practice
(7th ed. 1993) 11

Supreme Court Rule 10.1 8

Supreme Court Rule 10.1(b) 12

Supreme Court Rule 13.1 2, 8

Supreme Court Rule 13.3 2, 8

Supreme Court Rule 13.4 9

No. 95-487

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PROPAC-MASS, INC.,

Petitioner,

v.

LINDA RUTHARDT,
COMMISSIONER OF INSURANCE,
OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, respondent Linda Ruthardt, Commissioner of Insurance of Massachusetts, submits this brief in opposition to the petition for a writ of certiorari. ("Pet.").

Opinions Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 420 Mass. 45, 648 N.E.2d 407 (1995), and appears at pp. 1a - 7a of the appendix to the petition ("Pet. App."). The decision and orders of the Supreme Judicial Court for Suffolk County - the trial session of the Commonwealth's highest court - are not reported but appear at Pet. App. 8a - 9a. The decision of the respondent is not reported but appears at Pet. App. 10a - 15a.

The related decision and judgment of the Massachusetts Superior Court are not reported but appear at Pet. App. 16a - 32a. The Supreme Judicial Court affirmed that judgment in an opinion issued on the same day as the opinion in the case under review here. The opinion of the Supreme Judicial Court in the related case appears at 420 Mass. 39, 648 N.E.2d 435 (1995).

Jurisdiction

The opinion and judgment of the Supreme Judicial Court were entered on April 11, 1995. On July 11, 1995, Propac filed a petition for a writ of certiorari. On July 31, 1995, the Clerk of this Court rejected the petition on the ground that it had been filed one day late. Pet. at 2. See Supreme Court Rules 13.1 and 13.3.

On August 7, 1995, Propac filed in the Supreme Judicial Court a "Motion for Leave to Enlarge Time to File Petition for Rehearing" and a "Petition for Rehearing." Respondent opposed the motion. According to Propac's motion, "counsel's . . . miscalculation by one day prohibit[ed] the United States Supreme Court from docketing the petition and PROPAC's sole avenue of relief lies with th[e] [Supreme Judicial] Court."

Mot. to Enlarge Time at 2. Propac further argued that "even if the [Supreme Judicial] Court grants this motion [to enlarge time] and thereafter denies PROPAC's petition, that denial would give PROPAC ninety days within which to resubmit its petition to the United States Supreme Court for a writ of certiorari." Mot. to Enlarge Time at 6.

On August 29, 1995, the Supreme Judicial Court denied Propac's motion to enlarge time. Pet. App. 36a. On September 7, 1995, the Supreme Judicial Court issued a second order which stated: "The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied." Pet. App. 35a.

On September 21, 1995, Propac filed its second petition in this Court.

On September 25, 1995, Propac filed a "Motion for Clarification" in the Supreme Judicial Court, seeking an "amendment" to the "docket" to "reflect the granting" of Propac's motion to enlarge time. See Pet. at 2. This motion states that Propac "seeks clarification because the determination of which entry is correct controls the issue whether the time period for the filing of a petition for writ of certiorari to [the] United States Supreme Court has expired." Mot. for Clarification at 2. The Supreme Judicial Court has not acted on Propac's motion for clarification.

Propac invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a) (1988). In Argument I, below, respondent contends that the Court lacks jurisdiction because the second petition is untimely.

Constitutional Provision and Statutes Involved

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Mass. G.L. c. 175, § 5 (West 1987 ed.), appears at Pet. App. 33a-34a.

Mass. Gen. Laws c. 30A, § 13 (West 1992 ed.), provides:

> "License", as used in this section, includes any license, permit, certificate, registration, charter, authority or similar form of permission required by law.
>
> Except as otherwise provided in this section, no agency shall revoke or refuse to renew any license unless it has first offered the licensee an opportunity for hearing in conformity with sections ten, eleven and twelve. If a licensee has, in accordance with any law and with agency regulation, made timely and sufficient application for a renewal, his license shall not expire until his application has been finally determined by the agency. Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with sections ten, eleven and twelve.
>
> This section shall not apply -

(1) Where a provision of the General Laws expressly provides that an agency is not required to grant a hearing in regard to revocation, suspension or refusal to renew a license, as the case may be; or

(2) Where the agency is required by any law to revoke, suspend or refuse to renew a license , as the case may be, without exercising any discretion in the matter, on the basis or a court conviction or judgment; or

(3) Where the revocation, suspension or refusal to renew is based solely upon failure of the license to file timely reports, schedules, or applications, or to pay lawfully prescribed fees, or to maintain insurance coverage as required by any law or by regulation; or

(4) Where there is a refusal to renew the license of a foreign insurance company by said commissioner under authority of section five of chapter one hundred seventy-five, if such refusal or revocation is upon the grounds that such company is insolvent or is in an unsound financial condition, or that its condition or management is such as to render its further transaction of business hazardous to the public or its policyholders, or that the amount of its funds, net cash or contingent assets is deficient or that its capital stock or deposit or guaranty capital or guaranty fund is impaired, as set forth in section twenty-three A of said chapter one hundred and seventy-five, or that such capital

> stock, deposit or guaranty capital or guaranty fund has been reduced below the amount required by section one hundred and fifty-one of said chapter one hundred and seventy-five.

Mass. Gen. Laws c. 175, § 94F (West 1987 ed.), provides as follows:

> The commissioner shall examine the application and declaration and all documents filed in connection therewith; and, if he is satisfied that they comply with the law and the allegations of fact contained therein are true, he shall issue to the attorney in fact a license to transact business, authorizing him to execute for the subscribers under the name designated, such contracts or reciprocal or inter-insurance as are authorized by this chapter, which license shall be subject to section five; provided, however, that no license for a reciprocal insurance exchange consisting of subscribers who are commercial fishing boat owners shall be issued until the applicant has submitted to the commissioner the standards of risk management to be used in evaluating admissions and policy renewals, and until such standards have been certified by the commissioner as being reasonably calculated to provide a risk low enough to permit the reciprocal insurance exchange to remain solvent.

Mass. R. App. P. 27(a) provides as follows:

> A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time

is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted, except by order of the quorum or panel which decided the appeal. No answer to a petition for rehearing will be received unless requested by the quorum or panel, but a petition for rehearing will ordinarily not be granted in the absence of such a request. A petition for rehearing shall be decided by the quorum or panel which decided the appeal. If a petition for rehearing is granted, the quorum or panel may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. Action upon a petition is in the discretion of such quorum or panel, which may award costs, including a reasonable attorney's fee, to the prevailing party.

Statement of the Case

An accurate statement of the case appears in the opinion of the Supreme Judicial Court. Pet. App. 1a-4a.

Reasons for Denying the Writ

Under Supreme Court Rule 10.1, "[a] review on writ of certiorari is not a matter of right but of judicial discretion[,]" and "will be granted only when there are special and important reasons therefor." The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1982). For the reasons stated below, the petition (1) is untimely, and (2) does not satisfy the traditional criteria which guide the Court's discretionary review. Accordingly, the petition should be denied.

I. THE PETITION IS UNTIMELY BECAUSE NO TIMELY PETITION FOR REHEARING WAS FILED IN THE COURT BELOW.

Propac's second petition for a writ of certiorari in this Court is untimely because no timely petition for rehearing was filed in the court below. Under Supreme Court Rule 13.1, a petition is timely "when it is filed with the Clerk of this Court within 90 days of the entry of the judgment." Propac concedes that judgment was issued by the court below on April 11, 1995 (Pet. at 1); that Propac filed its first petition in this Court one day late (*id.* at 1-2); and that the Clerk of this Court "refused to receive" the petition. *See* Supreme Court Rule 13.3.

Propac's second petition is also untimely. It was filed on September 25, 1995, well beyond ninety days after entry of the judgment below. Propac argues, however, that the second petition is timely because it was filed within ninety days of the disposition of its belated petition for rehearing in the Supreme Judicial Court. This argument invokes Supreme Court Rule

13.4, which provides in relevant part:

> [I]f a petition for rehearing *is timely filed in the lower court* by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

Id. (emphasis added).

This rule does not support the timeliness of Propac's second petition because no petition for rehearing was timely filed in the lower court. Under Massachusetts law, a petition for rehearing is timely if "filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order." Mass. R. App. P. 27(a). Propac filed its Motion to Enlarge Time and Petition for Rehearing on August 7, 1995. Respondent opposed the motion. On August 29, 1995, the Supreme Judicial Court denied Propac's motion for leave to enlarge the time to file its petition for rehearing. Pet. App. 36a. On September 7, 1995, the Supreme Judicial Court denied the petition for rehearing. *Id.* at 35a.

These orders do not show that a petition for rehearing was timely filed in the lower court. In fact, the first order expressly *denied* the motion by which Propac sought to *make* timely a petition that was more than two months late. The second order of the Supreme Judicial Court denied the petition for rehearing, but there is no reason in the circumstances to believe the second order was, as Propac states, after "consideration of the merits" of the petition. Pet. at 2. Rather, it is more likely that the second order simply

implemented the first: the petition for rehearing was addressed and denied in light of the denial of the motion to enlarge time. In any event, there never was pending a "timely" petition for rehearing that tolled the ninety-day period for a petition in this Court.[1]

This result is consistent with the cases of the Court. The time for a petition for a writ of certiorari is not tolled where "a motion for leave to file . . . a petition [for rehearing] out of time . . . [is] denied . . ." *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940). The time for a petition is only tolled "where the court [below] *allows the filing* and, after considering the merits, denies the petition[.]" *Id.* (emphasis added). *See Morse* v. *United States*, 270 U.S. 151, 153-154 (1928)(where leave to file motion for new trial out of time not granted, period for appeal to Supreme Court not suspended); *cf. Pfister* v. *Finance Corp.*, 317 U.S. 144, 148-151 (1942)(under Bankruptcy Act, where court below did not "reexamine the basis" of original orders, time for filing petition for review not

---

[1] Propac's petition for rehearing could also have been denied by the Supreme Judicial Court for a jurisdictional reason apart from untimeliness: the fact that the court's rescript had issued on May 9, 1995, and had been entered on the docket of the lower court - the Supreme Judicial Court for Suffolk County - on May 10, 1995. *See* Mass. R. App. P. 23 (rescript issues to lower court twenty-eight days after date of rescript, unless stayed by timely filing of petition for rehearing); *Joyce* v. *George W. Prescott Publishing Co.*, 352 Mass. 767, 225 N.E.2d 355, 356 (1967)("After the case went to judgment in the Superior Court, the case is no longer subject to the jurisdiction of [the Supreme Judicial Court].").

extended). *See generally* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, pp. 284-287 (7th ed. 1993).

Propac admits that it filed its tardy petition for rehearing only after its first petition for certiorari was rejected by this Court as untimely. Pet. 1-2. Indeed, Propac's motion to enlarge time below stated that the allowance of the motion and the denial of the petition for rehearing "would give Propac ninety days within which to re-submit its petitions to the United States Supreme Court. . . ." Mot. to Enlarge Time at 6. The timing and content of Propac's motion thus show that it was designed solely as "an attempt to rejuvenate an extinguished right to appeal." *United States* v. *Healy*, 376 U.S. 75, 77 (1964)(timely filing of petition for rehearing in criminal case tolls time for appeal to Supreme Court). However, "[w]hen the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Credit Company, Limited* v. *Arkansas Central Railway Co.*, 128 U.S. 258, 261 (1888). If a judgment may be revived in the fashion attempted here, there would be no such thing as "the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 551 (1945). For all of these reasons, Propac's second petition in this Court is untimely. The petition should accordingly be denied.

II. THE PETITION FAILS TO CLAIM A CONFLICT IN THE COURTS BELOW OR PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT MERITS REVIEW BY THIS COURT.

Propac does not claim that the Supreme Judicial Court "has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Supreme Court Rule 10.1(b). Nor does Propac claim that the due process issue raised by the petition is unsettled, recurring, or of broad impact. In fact, the alleged error in the decision below has little or no importance beyond the unique facts of this case and the parties involved. In the absence of a claim of conflict or a national issue, the Court should deny the petition in this case.

III. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT UNDER THE DUE PROCESS CLAUSE.

The sole ground for the petition appears to be that the decision below "conflicts with applicable decisions of this Court." Pet. at 14. To the contrary, the decision below is consistent with the decisions of this Court under the Due Process Clause.

The court below correctly noted that Propac "had already had a judicial hearing in the Superior Court concerning the circumstances on which the commissioner based her revocation decision." Pet. App. 6a (citation omitted). The court held that "[o]n principles of collateral estoppel, Propac was bound by the findings of fact in the Superior Court case even if the Superior

Court judgment was on appeal." *Id.* The court below further held that "[c]ertainly due process principles did not entitle Propac to two hearings." *Id.* (citations omitted). The court concluded that the "commissioner properly relied on the findings and rulings that the trial judge had made, and that [the Supreme Judicial Court] upheld. . . ." *Id.*

The decision below is consistent with decisions of this Court. An executive official may revoke the license of a person on the basis of findings of fact entered against the same person in a previous trial. In such cases, the Due Process Clause does not require a second hearing because the material facts are decided by the first. Where "the government makes a decision based upon *facts* which have already been determined through some adequate procedural system *such as a trial*[,] . . . the individual will have no further right to a hearing if the disputed issues have already been resolved by adequate process." R. Rotunda & J. Nowak, *Treatise on Constitutional Law*, § 17.8 at 645-646 (2d ed. 1992)(emphasis added). "Thus the Court has held that there is no right to a hearing or other procedure in connection with a suspension or revocation of a person's automobile driver's license where the revocation is based on violations of traffic laws which were previously established through the judicial process." *Id.* (footnote omitted)(citing *Dixon* v. *Love*, 431 U.S. 105, 112-114 (1977)). *See Almeida* v. *Lucey*, 372 F. Supp. 109, 112 (D. Mass. 1974)(three-judge court), *aff'd*, 419 U.S. 806 (1974); *cf. Parratt* v. *Taylor*, 451 U.S. 527, 543-544 (1981)(Due Process Clause does not require predeprivation administrative hearing where State provides adequate judicial means to compensate for loss).

Here, Propac received a full opportunity in the Massachusetts Superior Court to contest the facts material to the revocation of its license.[2] The Superior Court found that the Board of Advisors of the Massachusetts Employers Insurance Exchange (MEIE) had authority, under the governing documents and statutes, to give the notice of termination of Propac as attorney-in-fact on December 4, 1992. Pet. App. 26a-28a. The Superior Court further found that

> Propac . . . did not accept its notice of termination. Rather than cooperating with the Exchange to insure an orderly and peaceful transition, it challenged the Exchange's authority to terminate it as attorney-in-fact. Propac removed files to another location without notice to the Exchange. Propac informed the Exchange on November 15, 1993, that it was vacating the Exchange's principal office. Propac informed AIM [Associated Industries of Massachusetts] subscribers that their workers' compensation insurance would be jeopardized if they signed a new power of attorney appointing a different attorney-in-fact. Propac instructed AIM subscribers to pay premiums to it instead of the Exchange. Propac conducted a campaign to solicit AIM subscribers for its account. Propac, in sum, challenged AIM in the

---

[2] Nothing in the record shows that Propac even requested a hearing before the Commissioner. The lack of such a request undermines a claim that the Due Process Clause required a second hearing. *See Sullivan* v. *Carignan*, 733 F.2d 8, 9 (1st Cir. 1984).

marketplace and in the courtroom.

Pet. App. 21a.

The court found that "Propac on notice of termination refused and refuses to cooperate with the Exchange in an orderly transition to a new attorney-in-fact. Rather, Propac engages in a campaign to retain office in breach of a covenant, fairly read, that permits the Exchange, without cause, to terminate it." Pet. App. 28a-29a. The court ruled that "Propac is in violation of its covenant, implied in the agreement of good faith and fair dealing" and further ruled that "Propac's conduct constitutes unfair acts or practices in violation of [Mass. G.L. c.] c. 93A." Pet. App. 29a; *see Mass. Employers Insurance Exchange* v. *Propac-Mass., Inc.*, 420 Mass. at 40-42, 648 N.E.2d at 437-438.

The Commissioner revoked Propac's license on the basis of these findings of the Superior Court. Pet. App. 2a-3a, 10a-15a. The Commissioner ruled that "Propac has engaged, and has indicated its intent to engage, in conduct which renders its further transaction of business hazardous to the public and the subscribers of [the Exchange]." Pet. App. 4a.

Despite the findings of the Superior Court, Propac argues that it was entitled to a second hearing before the Commissioner because the "Superior Court never addressed the issue facing the Commissioner regarding the continued licensure of [Propac]." Pet. at 15. Propac thus argues that since revocation of its license was not an issue in the Superior Court, the Commissioner violated principles of due process in relying on the findings of that court.

These arguments miss the point of the cases of this Court. An agency need not hold a second hearing when the earlier

hearing has decided the material *facts*. In such cases, the first hearing need not have decided the same question of *law* as the second hearing. *See Dixon* v. *Love*, 431 U.S. at 112-114. Thus, in this case, it was enough that at trial Propac had the opportunity to address the questions of fact that were material to the license revocation. These factual findings were relevant to the license revocation because they established a reasonable basis for the Commissioner's judgment that the "further transaction of business" by Propac "would be hazardous to public." Mass. G.L. c. 175, § 5. There was no need for a second hearing to establish the same facts.

The following example illustrates the point. A doctor is convicted of murdering a patient. The state Board of Registration in Medicine revokes his license without a hearing, citing the need for prompt action and its view that the material facts were decided by the criminal court. The doctor objects and argues that the murder trial had "nothing to do with his license" and that this fact was "tacitly acknowledged" by representatives of the Board who attended the trail for murder. The doctor's argument would be beside the point. Of course the murder trial would not have decided whether the doctor should remain licensed. But the trial would have established facts relevant to revocation, and the Board could rely on such findings without holding its own hearing. For the same reasons, the Court below correctly rejected Propac's due process claim. Litigation is not a lottery, and Propac had no constitutional right to relitigate the findings of the Superior Court before the Commissioner.

Finally, the findings of the Superior Court also obviated the need for the court below to reach the question whether, in the absence of a prior hearing, the Due Process Clause requires a

hearing before the Commissioner prior to the revocation of the license of an attorney-in-fact for conduct "hazardous to the public" under Mass. G.L. c. 175, § 5. *See* Pet. App. 6a. Since the court below did not reach that question, this Court should not grant the petition to consider it. *See Capital Cities Cable Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984)(Court does "not ordinarily consider questions not specifically passed upon by the lower court").

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

LINDA RUTHARDT,
as Commissioner of Insurance
of the Commonwealth of Massachusetts

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General of Massachusetts

THOMAS A. BARNICO*
Assistant Attorney General
Government Bureau
One Ashburton Place, Rm. 2019
Boston, Massachusetts 02108-1698
(617) 727-2200, ext. 2086
**Counsel of Record*

Dated: October 20, 1995

Supreme Court, U.S.
FILED
OCT 26 1995
CLERK

No. 95-487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PROPAC-MASS, INC.,

Petitioner,

—v.—

LINDA RUTHARDT, COMMISSIONER OF INSURANCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONER

EDWARD B. DEUTSCH
(Counsel of Record)
ROBERT L. CLIFFORD
MCELROY, DEUTSCH & MULVANEY
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075
(201) 993-8100

Attorneys for Petitioner,
PROPAC-MASS, INC.

BEST AVAILABLE COPY

35 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

I. Because The Supreme Judicial Court of Massachusetts Considered the Merits of Petitioner's Petition for Rehearing and the Petition was Thus Timely Filed under Massachusetts Law, Jurisdiction Properly Lies with this Court 1

CONCLUSION 4

TABLE OF AUTHORITIES

PAGE

Constitutional Provisions, Statutes, and Rules:

U.S. Supreme Court Rule 13.4 1

Mass.R.App.Pro. 27(a) 2

REASONS FOR GRANTING THE WRIT

I. Because The Supreme Judicial Court of Massachusetts Considered the Merits of Petitioner's Petition for Rehearing and the Petition was Thus Timely Filed under Massachusetts Law, Jurisdiction Properly Lies with this Court

In her opposition to the Petition for Writ of Certiorari of Petitioner, PROPAC-MASS, Inc. ("PROPAC"), Respondent contends that this Court lacks jurisdiction to consider the Petition filed on September 21, 1995, because the Petition was not timely filed. That contention rests on Respondent's argument that the Supreme Judicial Court of Massachusetts did not consider timely filed PROPAC's August 7, 1995, Petition for Rehearing in that court. Respondent contends that the ninety-day period to file a Petition for Writ of Certiorari expired on July 10, 1995—ninety days after the original decision of the court below.

Petitioner counters that the period for review in this Court commenced with the September 7, 1995, denial of Petitioner's Petition for Rehearing in the court below and that the Petition filed by PROPAC on September 21, 1995, was timely filed pursuant to Supreme Court Rule 13.4, which states:

> [I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

Respondent's contention rests on the Supreme Judicial Court's August 29, 1995, denial of Petitioner's Motion to Enlarge Time to File Petition for Rehearing and ignores a subsequent Order of the Supreme Judicial Court of September 7, 1995, which stated: "The Petition for Rehearing filed in the above captioned case *has been considered by the court* and

is denied." (Emphasis added). Pet. App. 35a. Under Massachusetts Rule of Appellate Procedure 27(a), a Petition for Rehearing is timely filed if "filed with the clerk of the appellate court within fourteen days after the date of rescript *unless the time is shortened or enlarged by order.*" (Emphasis added).

As PROPAC acknowledged in its Petition, some confusion was engendered by the issuance of seemingly inconsistent orders of the Supreme Judicial Court of Massachuetts. (Pet. at 2) Nevertheless, the Massachusetts court's September 7, 1995, order unambiguously indicates that that court considered the merits of the Petition for Rehearing. Thus, that court must have accepted the filing of the Petition for Rehearing. If the Petition for Rehearing was considered untimely by the Massachusetts court, as contended by Respondent, that court would not have acted at all on the Petition for Rehearing, which would have been rendered moot if the court's first order controlled.

The Supreme Judicial Court's subsequent actions further buttress that conclusion. That court has chosen not to act on Petitioner's Motion for Clarification, finding it moot in light of this Court's docketing of the Petition for Writ of Certiorari. Clearly, the Massachusetts court has acknowledged that jurisdiction is proper in this Court: its determination not to issue an order stating that the Petition for Rehearing was untimely even after it learned that a Petition for Writ of Certiorari had been docketed in this Court can lead to no other conclusion.

Nor was PROPAC's Petition for Rehearing merely a subterfuge designed solely to revive jurisdiction in this Court. Both PROPAC's Motion to Enlarge Time to File Petition for Rehearing (Supplemental App. at 1a) and Motion for Clarification (Supplemental App. at 20a) make clear that PROPAC sought review in Massachusetts because rehearing by the Supreme Judicial Court became the only review possible when PROPAC's initial Petition for Writ of Certiorari to this

Court was filed a day late. In those filings to the Massachusetts court, counsel for PROPAC candidly acknowledged that a second purpose was to provide United States Supreme Court jurisdiction in the event that the Massachusetts court declined to reverse its earlier determination. Nevertheless, the Petition for Rehearing was not a mere sham designed to gain review by this Court; rather, it was a detailed request that the court below reconsider several important issues that Petitioner contends the court overlooked or wrongly decided in its decision of April 11, 1995. (See Petition for Rehearing in Supplemental App. at 7a). The Supreme Judicial Court treated it as such, as revealed by its consideration of the merits of the Petition for Rehearing.

For the above-stated reasons, Petitioner had ninety days from the September 7, 1991, denial of its Petition for Rehearing to file a Petition for Writ of Certiorari to this Court. Petition filed its Petition for Writ of Ceriorari on September 21, 1995. This Court therefore has subject-matter jurisdiction over this Petition pursuant to 28 U.S.C. § 1257(a) (1982).

CONCLUSION

For the above-stated reasons and for the reasons expressed in Petitioner's original Petition for Writ of Certiorari, Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the court below.

Respectfully submitted,

EDWARD B. DEUTSCH
(*Counsel of Record*)
ROBERT L. CLIFFORD
MCELROY, DEUTSCH & MULVANEY
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075
(201) 993-8100

Attorneys for Petitioner,
PROPAC-MASS, INC.

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

		PAGE
A.	Motion to Enlarge Time for Filing of Petition for Rehearing of PROPAC-MASS, Inc.	1a
B.	Petition for Rehearing of PROPAC-MASS, Inc. ..	7a
C.	Motion for Clarification of PROPAC-MASS-Inc..	20a

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.
SUPREME JUDICIAL COURT

Docket No. SJC-06610

PROPAC-MASS, INC.,

Plaintiff-Movant,

—VS.—

COMMISSIONER OF INSURANCE,

Defendant.

MOTION OF PLAINTIFF-MOVANT PROPAC-MASS, INC., FOR LEAVE TO ENLARGE TIME TO FILE PETITION FOR REHEARING

PRELIMINARY STATEMENT

Pursuant to *M.R.A.P.* 14(b), plaintiff-movant PROPAC-MASS, Inc. ("PROPAC"), respectfully moves for leave to enlarge the time to file a *Rule* 27 petition for rehearing of *PROPAC-MASS, Inc. v. Commissioner of Insurance*, No. SJC-06610. As shown below, the facts demonstrate that good cause exists to grant the extension. The rehearing, if granted, will involve consideration of constitutional and other issues not decided by this Court's opinion in the underlying case.

PROCEDURAL HISTORY

This case has its roots in defendant's December 31, 1993, revocation of PROPAC's license to exchange reciprocal contracts of insurance in the State of Massachusetts. PROPAC first received notice of the revocation on January 3, 1993. On an Emergency Motion, Propac petitioned a Single Justice (Lynch, J.) to stay the revocation and to declare it void. The Single Justice denied the petition on March 14, 1995, and entered an Amended Order resolving the merits of the petition on March 29, 1995. PROPAC appealed to this Court, which, on April 11, 1995, decided against PROPAC. Thereafter, PROPAC petitioned to the United States Supreme Court for a writ of certiorari. However, due to counsel's miscalculation of the period for filing the petition on behalf of PROPAC, counsel filed on July 11, 1995, instead on July 10, 1995. That miscalculation by one day prohibits the United States Supreme Court from docketing the petition. Accordingly, PROPAC's sole avenue of relief lies with this Court.

BRIEF STATEMENT OF FACTS

The procedural history of this case may be found in this Court's opinion at 420 Mass. 45, 648 N.E.2d 407 (1995). As noted in that opinion, PROPAC was the licensed attorney-in-fact for the Massachusetts Employers' Insurance Exchange ("MEIE"), a domestic reciprocal insurance exchange. In December 1993, the advisory committee of MEIE sent notice to PROPAC of the termination of its status as attorney-in-fact. That termination was the subject of a separate suit that resulted in Findings of Fact and Conclusions of Law being issued by the Honorable David M. Roseman, J.S.C., on December 30, 1993. On that same day, Propac was called to a meeting with defendant allegedly to discuss the status of an on-going statutory financial examination concerning the Exchange. In fact, the meeting was devoted to a discussion of Judge Roseman's Findings of Fact and Conclusions of Law

and what Propac's intended response to the decision would be. At that meeting, PROPAC's license was never discussed. However, the following day, December 31, 1993, defendant issued a notice revoking PROPAC's license. PROPAC received the revocation notice on January 3, 1994, four days after the revocation became effective.

Pursuant to M.G.L. c. 175, § 5 (1992 ed.) ("section five"), PROPAC petitioned for a stay of that revocation and a declaration that it was void. A Single Justice denied the petition on March 14, 1995, and issued an Amended Order on March 29, 1995. This Court affirmed the Amended Order in its April 11, 1995 decision. It held that the revocation did not require a pre-revocation hearing and that the December 1993 hearing before Judge Roseman, at which PROPAC's license was never at issue, satisfied any due-process concerns. Accordingly, this Court never reached the issue of the constitutionality of section five. Finally, the Court held that section five does not require notice of revocation before the revocation becomes effective.[1]

Those rulings formed the basis of PROPAC's petition to the United States Supreme Court for a writ of certiorari. As noted, counsel for PROPAC miscalculated the period within which it had to file the petition. Counsel filed one day late, and the Clerk of the Court, as required, returned the petition. PROPAC now respectfully moves for leave to extend the time for filing with this Court a Petition for Rehearing Seeking Reconsideration.

LEGAL ARGUMENT

Under *M.R.A.P.* 14(b), an appellate court or single justice "for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may

---

[1] In addition, the Court did not address PROPAC's independent argument that the license revocation should be vacated as it resulted from an arbitrary and capricious exercise of power by the Commissioner.

permit an act to be done after the expiration of such time" for a period of up to one year. PROPAC moves pursuant *M.R.A.P.* 14(b) for leave to enlarge the time to file a Petition for Rehearing under *M.R.A.P.* 27.

In respect of procedural matters, a "flexible approach to the rules * * * is particularly appropriate." *Commonwealth v. Hartsgrove*, 407 Mass. 441, 444 (1990). That flexible and liberal approach applies even where time limits are considered jurisdictional. *See Cummings v. City Counsel*, 28 Mass. App. Ct. 345, 348, 551 N.E.2d 46, 49 (App. Ct.) *further appellate review denied*, 407 Mass. 1102, 554 N.E.2d 851 (1990).

A party becomes entitled to *Rule* 14(b) relief on a showing of "good cause" for its non-compliance with the relevant time limitation. *Bernard v. United Brands Co.*, 27 Mass. App. Ct. 415, 418-19 n.8, 538 N.E.2d 1003, 1006 n.8 (App. Ct. 1989) (denying, for reasons of preclusion and for no good cause shown, relief under *M.R.A.P.* 14(b) where application for *M.R.A.P.* 4(c) on *same grounds* had already been denied). "Good cause shown" is a standard substantially similar to *Rule* 4(c)'s "excusable neglect." Case law has interpreted "good cause" to require extraordinary circumstances for relief. *Id.* at 418-19 n.8, 538 N.E.2d at 1006 n.8. In deciding motions under *Rule* 14(b), courts should consider whether the movant's claim is meritorious or substantial, *Tisei v. Building Inspector*, 3 Mass. App. Ct. 377, 379, 330 N.E.2d 488, 489 (App. Ct. 1975), and whether the opposing party can claim material prejudice. *Standard Register Co. v. Bolton-Emerson, Inc.*, 35 Mass. App. Ct. 570, 573, 623 N.E.2d 502, 504 (1993).

In *Stowe v. Bologna*, 32 Mass. App. Ct. 612, 592 N.E.2d 764 (1992), the court granted an enlargement of the time to file a petition for rehearing. The court permitted the enlargement because the decision that formed the basis of the petition to enlarge the time was issued only after the normal time for petitioning had expired, and after the decision had been released, the petitioner had "acted very promptly." *Id.* at 613 n.4, 766 n.4. *Stowe* is much like the instant case. Here,

PROPAC, through its counsel, pursued what it considered to be the best course of action in light of this Court's decision: filing a petition for a writ of certiorari to the United States Supreme Court. As soon as counsel became aware of its time-calculation error, this motion and its accompanying petition for reconsideration were drafted.

Where a client is justified in relying on the actions of the attorney, has acted with due diligence, and is not chargeable with culpable neglect, "justice and equity require presentation of [that client's] claim." *Hastoupis v. Gargas*, 9 Mass. App. Ct. 27, 32, 398 N.E.2d 745, 749 (App. Ct. 1980). Here, PROPAC has done nothing to warrant that its claims not be heard. Accordingly, PROPAC, through its counsel, respectfully requests that this Court grant this motion to allow PROPAC to petition this Court for a rehearing of due-process issues that this Court did not decide in its opinion and that, PROPAC respectfully submits, are essential to the determination of this case. In the alternative, even if this Court grants this motion and thereafter denies PROPAC's petition, that denial would give PROPAC ninety days within which to re-submit its petition to the United States Supreme Court for a writ of certiorari. Either action would permit the adjudication of the merits of PROPAC's due-process claims. Such an adjudication on the merits is exactly the result intended by the rules of appellate procedure. See *supra* at 4. The relief sought by PROPAC—the granting of this motion to enlarge the time to petition for rehearing—does not prejudice any party, nor does it bind this Court to any course of action thereafter. The liberal, flexible approach authorized by the rules of appellate procedure to relieve procedural non-compliance is especially applicable where the fault for procedural non-compliance lies solely with counsel. Any other disposition of this motion would work an undue and inequitable hardship on PROPAC, which bears no blame for the delay in filing. Accordingly, PROPAC, through its counsel, respectfully submits that equity and justice favor the granting of this motion.

CONCLUSION

For the reasons set forth above, plaintiff-movant, PROPAC-MASS, Inc., respectfully requests that this Court grant this motion and enter an Order enlarging the time to file a Petition for Reconsideration.

Respectfully submitted,

/s/ EDWARD B. DEUTSCH
Edward B. Deutsch
McElroy, Deutsch & Mulvaney
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, N.J. 07962-2075

APPENDIX B

[LETTERHEAD]

August 7, 1995

The Honorable Paul J. Liacos
Chief Justice
Supreme Judicial Court of Massachusetts
Suffolk County Court House
Pemberton Square
Boston, Massachusetts 02108

Re: PROPAC-MASS., Inc. v. Linda Ruthardt, Commissioner of Insurance
No. SJC-06610

Dear Chief Justice Liacos:

Please accept this Petition for Rehearing pursuant to R. P. 27 on behalf of plaintiff/appellant PROPAC-MASS, Inc. ("Propac") in connection with the Court's decision, rendered on April 11, 1995, in the above-referenced appeal. A true copy of the Court's opinion, reported at 420 Mass. 45 (1995), is attached hereto as Exhibit A. In that appeal, Propac sought reversal of the revocation by the Commissioner of Insurance of the Commonwealth of Massachusetts of the license that authorized Propac, as the attorney in fact, to execute contracts of reciprocal or inter-insurance for the subscribers of the Massachusetts Employers Insurance Exchange ("the Exchange"), a reciprocal insurance exchange created under the Massachusetts Reciprocal Exchange Law, G.L. c. 175, S 94A-94M (West 1987).

In support of its position that the license revocation should be vacated, Propac argued 1) that the revocation of its license without prior notice and an opportunity to be heard violated its right to due process under the United States and Massachusetts Constitutions; and 2) that the revocation of the license should be set aside because the failure of the Com-

missioner to provide notice and a hearing prior to the revocation was an arbitrary and capricious exercise of power.

Rehearing should be granted so that the Court may reconsider its use of the doctrine of collateral estoppel to conclude that there was no due process violation because Propac had received a hearing on the issue pertinent to the license revocation in a prior contract action in the Massachusetts Superior Court. Propac respectfully submits that the Court's invocation of collateral estoppel was erroneous. Propac further submits that because of its improper reliance on collateral estoppel, the Court erroneously failed to consider the question of whether G.L.c. 175 § 5 ("Section 5") is unconstitutional because it does not require a hearing before a license is revoked pursuant to its provisions. Second, rehearing is warranted because the court failed to consider Propac's independent contention that the license revocation should be set aside because it resulted from the commissioner's arbitrary and capricious exercise of power.

I. THE COURT'S RELIANCE ON THE DOCTRINE OF COLLATERAL ESTOPPEL AND RESULTANT FAILURE TO CONSIDER THE CONSTITUTIONALITY OF G.L.C. 175, § 5 WAS ERRONEOUS

A. The Court Improperly Invoked the Doctrine of Collateral Estoppel.

In its opinion the Court determined that it need not consider whether Section 5, which provides an aggrieved licensee a hearing only after its license has been revoked, meets constitutional due-process requirements. 420 Mass. at 50. That conclusion was based on the Court's determination that Propac had, in the contract action tried in the Superior Court, already had an opportunity to be heard on the issue confronting the Commissioner in connection with the license revocation: whether Propac's continued transaction of business would be hazardous to the public or the subscribers of the Exchange. Thus, the Court held that Propac was barred by

"principles of collateral estoppel" from having a separate hearing on the license revocation issue. Respectfully, that determination was wrong.

The United States Supreme Court has placed strict constitutional limits on the use of collateral estoppel. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982). Those limits prohibit issue preclusion unless the party estopped had a full and fair opportunity to litigate the issue and a factual determination against that party had been made.

Contrary to the opinion of the Court, Propac had *no* opportunity to litigate the issue of whether its continued transaction of business was hazardous to the public or the subscribers of the Exchange and *no* determination of that issue was made in the Superior Court. Rather, the Superior Court action involved litigation of an unrelated contract dispute, which included a claim for breach of contract, an alleged violation of the implied covenant of good faith and fair dealing, and an alleged violation of the Massachusetts Unfair Trade Practices Law, G.L. c. 93a. In ruling on those purely contractual issues, the Superior Court never addressed the issue facing the Commissioner regarding the continued licensure of Petitioner as attorney in fact of the Exchange.

Moreover, as is set forth in the statute, and as specifically and repeatedly acknowledged by the trial court itself, the parties to that action, *and representatives of the Division of Insurance*, the issue of the revocation of Propac's license could not have been decided in that forum. See Propac's Reply brief (Exhibit C) at pp. 1 though 5 for a full discussion of the issue. Section 5 provides the only mechanism for revoking the license of an attorney in fact of a reciprocal insurance exchange. That power may be exercised solely by the Commissioner of Insurance and only in the limited circumstances set forth in the statute. Accordingly, because the issue necessary to the license revocation was not and could

not have been litigated in the prior proceeding, Propac was denied a full and fair opportunity to litigate the question whether its continued transaction of business would be hazardous to the public or MEIE's subscribers, and the Court's invocation of the doctrine of collateral estoppel was simply wrong. Because Petitioner was thus denied notice and opportunity to contest the revocation before it took effect, due process was denied.

B. Section 5 Is Unconstitutional Because It Does Not Provide For A Pre-deprivation Hearing.

Section 5 denies entities subject to its provisions due process because it provides for *no* opportunity to contest a license revocation prior to its accomplishment. The United States Supreme Court has described the "central meaning" of procedural due process as follows: " 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223 (1863)). The "root requirement" of due process is that "the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' " *Id.* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The opportunity for a hearing must be given before the deprivation of a property interest "except for extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371 at 379 (1971); *see also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.7 (1972) (stating that instances that justify deprivation of protected interest without prior hearing are "rare and extraordinary"). When "protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents, supra*, 408 U.S. at 569-70.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the United States Supreme Court articulated a three-part balancing test

to determine whether government procedures satisfy due process requirements. Under *Mathews*, "the specific dictates of due process" require consideration of

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The Supreme Court has held, with few exceptions, that government procedures that afford hearings only *after* the deprivation of a property right violate due process.

At issue in *Fuentes*, *supra*, was the constitutionality of two prejudgment replevin statutes, neither of which provided for notice or an opportunity to be heard prior to the State's seizure of goods. 407 U.S. at 80. Like Section 5, both statutes provided only for post-deprivation hearings. The issue in *Fuentes*, as in this case, was whether procedural due process required an opportunity for a hearing *before* the State seized the property. *Id.* at 80. In holding the statutes unconstitutional, the Court observed that

> [t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional

> and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Id. at 80-81 (citations omitted). Citing its previous "tolerat[ion]" of variances in the *form* of a hearing " 'appropriate to the nature of the case' and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' " *id.* at 82 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), and *Boddie, supra*, 401 U.S. at 378), the Court reiterated its traditional insistence that "whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes effect." *Id.* at 82 (citing *Bell v. Burson*, 402 U.S. 535, 542 (1971)) (emphasis added) (other citations omitted). The Court further commented on the ineffectiveness of a *post*-deprivation hearing:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

Id. at 81-82 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1971)); *see also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985) (requiring hearing prior to for cause dismissal of tenured public employees as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action").

This Court likewise has recognized the primacy of the right to notice and an opportunity to be heard *prior* to the deprivation of a property interest. In *Milligan v. Board of Registration*, 348 Mass. 491 (1965), the Court held, among other things, that procedural due process of law, based on "ordinary concepts of fairness," required that qualified pharmacists who had applied for drug store permits be given an opportunity for a hearing by the Board of Registration in Pharmacy before they could be denied permission to operate drug stores. *Id.* at 499. Like Section 5, the statute did not "expressly require a hearing" in respect of an application for a drug store permit. *Id.* at 495.

In holding that a hearing under the statute was "constitutionally required," 348 Mass. at 500, the Court stated that

> [t]he true principle is that a party who has a sufficient interest . . . at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance where some other interest, such as national security, justifies an overriding of the interest in fair hearing.

Id. at 496 (citation omitted).

Significantly, the *Milligan* Court expressly stated that "the revocation of licenses presents a somewhat analogous problem," and noted that recent decisions in other states had indicated that "a hearing is necessary in such cases." *Id.* at 230 (citing, among others, *Beckler v. Parsekian*, 36 N.J. 242, 256-58, 176 A.2d 470 (1961) (driver's license may not be revoked except by due process and licensee must be fully informed of a charge against him and be afforded fair opportunity to be heard); *State v. Moseng*, 95 N.W.2d 6, 13 (1959) (same); *Wignall v. Fletcher*, 303 N.Y. 435, 439-43 108 N.E.2d 728 (1952) (due process required that driver, whose license was sought to be revoked, be duly informed under what statute he was being proceeded against)).

The foregoing precedents overwhelmingly demonstrate that Section 5 unconstitutionally works a deprivation of property without due process of law insofar as it denies the right to be heard prior to a license revocation. The statute requires only that if the Commissioner is "satisfied" that a company's "condition or management is such as to render its further transaction of business hazardous to the public or its policyholders," the Commissioner must send "written notice . . . specifying the date on which such revocation . . . shall be effective . . . and the ground for such revocation." In addition, Section 5 does not require the Commissioner to make any *findings of fact* concerning that determination.

Section 5 provides for post-revocation review by a Single Justice of the Supreme Judicial Court, who is required "summarily [to] hear and determine the question whether the ground for revocation . . . specified in the notice of the commissioner exists." If the only requirements imposed on the Commissioner are those in Section 5, how a Single Justice can review the Commissioner's action is unclear. Without the benefit of a prior hearing or even a requirement that the Commissioner make findings of fact, the reviewing Justice is required to examine only the Commissioner's blanket statement that a ground for revocation exists. As this Court has noted, "Without findings on all material issues presented by the record, [the] court cannot properly exercise its appellate function." *Smith v. Director of Division of Employment Security*, 376 Mass. 563, 566 (1978). Under Section 5, not only do no findings presented by the record exist—*no record exists*.

Balancing the three interests outlined in *Mathews* compels the conclusion that the procedures afforded under Section 5 are constitutionally defective. First, the significance of Petitioner's private interest in retaining its license—indeed, its means of livelihood—"cannot be gainsaid." *Cleveland Board of Education, supra*, 470 U.S. at 543. Procedural due process requires confrontation and cross-examination of those whose word deprives a person of his or her livelihood. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103 (1963).

As a result of the revocation, Petitioner will be precluded from conducting any insurance-related business in the Commonwealth of Massachusetts without having had any opportunity to contradict its accusers. The ability of its principals to become licensed as attorney in fact for exchanges in other states likewise has been effectively vitiated. The revocation of Petitioner's license, even if ultimately reversed, has irrevocably damaged the reputations of its principals. No demonstrated governmental interest in immediate revocation outweighs those interests. *See Greene v. McElroy*, 360 U.S. 474 (1959) (finding that revocation of security clearance effectively disqualified aeronautical engineer from future work in his entire field and therefore entitled him to predeprivation hearing). As in *Greene*, the Commissioner's action in this case has extinguished the employment prospects of Petitioner's principals, both of whom have dedicated the majority of their professional lives to the insurance industry. The facts cannot be stated more simply: the Commissioner took Petitioner's means of livelihood and, *without compensation*, gave it to someone else.

Second, consideration of the "factor that calls most strongly for a pre-enforcement hearing"—the risk of an erroneous deprivation of property and the probable value of additional or substitute procedural safeguards—demonstrates that Petitioner was entitled to a prior hearing. *See Application of United States*, 610 F.2d 1148, 1157 (3d Cir. 1979). As outlined above, the risk of an erroneous deprivation of property is extreme if the Commissioner is not required to create any record, make any findings of fact, or allow the company whose license is to be revoked a chance to address the charges or offer evidence to rebut those charges.

Equally significant is the undeniable circumstance that the requirement of a prior hearing carries no severe burden for the Division of Insurance. Indeed, the public interest is best served in such a case by requiring a preliminary public hearing. A determination concerning the license of the attorney in fact of an exchange not only affects the licensee, but also has

a *substantial* impact on the exchange's subscribers. The interests of the more than 800 subscribers would best have been served by ensuring that a revocation of Petitioner's license was based on correct determinations of fact and reasoned conclusions concerning the danger, if any, involved in PROPAC's continued transaction of business. Any purported interest in immediate revocation cannot and does not outweigh the obvious interest of the subscribers in being fully informed on issues of critical importance to at least the perceived effect of the displacement of their Attorney in Fact on their continued insurance coverage. Providing a hearing would have afforded the requisite assurance and would have imposed neither a significant administrative burden nor an intolerable delay.

Finally, the government interests involved do not justify dispensing with the prior-hearing requirement. Petitioner recognizes that the Division has an interest in protecting the public from practices of a foreign insurance company, to which it may not have immediate access, that appear contrary to the public good. Foreign insurance companies "as distinguished from domestic companies generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 585 (1935). That interest, however, is simply not implicated with a domestic exchange and is not served by arbitrary and uninformed actions by the Commissioner. In fact, that interest is severely jeopardized when a government official takes action of the kind taken in the present case.

Scrutiny of Section 5 under *Mathews* and the other applicable precedents reveals its constitutional invalidity as it applies to the attorney in fact of a domestic insurance exchange such as Petitioner. The post-revocation hearing does not provide for an opportunity to be heard at a meaningful time and in a meaningful manner. The government's interest in immediate revocation does not outweigh the "obvious value in reaching an accurate decision." *Cleveland Board of Education, supra*, 470 U.S. at 543. As was noted in that case,

"Even where the facts are clear, the appropriateness or necessity of the [revocation] may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be *before* the termination takes effect." *Id.* (emphasis added). Because the statute provides for no such opportunity, the statute should be stricken.

II. THE REVOCATION OF PROPAC'S LICENSE MUST BE SET ASIDE BECAUSE THE FAILURE OF THE COMMISSIONER TO PROVIDE NOTICE AND A HEARING PRIOR TO THE REVOCATION WAS AN ARBITRARY AND CAPRICIOUS EXERCISE OF POWER

In its opinion the Court did not address Propac's independent argument that the license revocation should be vacated because it resulted from an arbitrary and capricious exercise of power by the Commissioner. Rehearing should be granted to permit a ruling on that issue.

It is well settled that licensing authorities act "in a quasi-judicial capacity when revoking licenses" pursuant to Massachusetts law and "may not act unreasonably or arbitrarily" toward that end. *Konstantopoulos v. Town of Whately*, 384 Mass. 123, 131-32 (1981). Fulfillment of the "quasi-judicial" function "requires that formal notice be given a licensee that adverse action is contemplated, and that an opportunity to respond to and contest the action be afforded." *Id.*

The Commissioner's failure to provide notice to PROPAC before revoking its license was an arbitrary and capricious abuse of discretion. The truly willful nature of the Commissioner's act is manifested in the undisputed fact that on the day before the license revocation became effective—the same day the "Notice" was issued—the Commissioner had the opportunity to inform PROPAC of the impending revocation in person and afford it some sort of opportunity to respond. The Commissioner failed to do so, deliberately concealed the fact that she was contemplating revocation, and the next day revoked the license with no advance notice to PROPAC. As

noted in the original brief filed in support of the appeal at 54-56 (Exhibit B), PROPAC did not become aware of the revocation until three days later. The Commissioner's action was not only constitutionally defective, but was an arbitrary and capricious exercise of her powers that prejudiced PROPAC's substantial rights.

The Commissioner's failure to conduct a hearing prior to exercising the quasi-judicial act of revoking PROPAC's license likewise constituted an abuse of discretion. This Court has consistently held that the government's failure to conduct a hearing and make reasonable findings based on evidence submitted by both the complaining and responding parties is an arbitrary and capricious exercise of power, warranting reversal. *American Employers Insurance Co. v. Commissioner of Insurance*, 298 Mass. 161, 166 (1937) ('[T]he provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced *or to make an essential finding without supporting evidence is arbitrary action.*') (quoting *Baltimore and Ohio Railroad v. United States*, 264 U.S. 258, 264 (1924), and *Morgan v. United States*, 298 U.S. 468 (1936)); *see also Woodbury v. Municipal Council*, 318 Mass. 385 (1945) (holding that action of municipal council in revoking plaintiff's license when no grounds were demonstrated at the hearing "an arbitrary, capricious and unreasonable exercise of power"); *accord Massachusetts General Hospital v. Commissioner of Public Welfare*, 350 Mass. 712, 720 (1966) (referees's decision denying compensation to hospital for portion of medical care of recipients of old age and disability assistance was without evidential support and was therefore arbitrary and capricious).

These cases demonstrate this Court's requirement that "essential findings" by an administrative officer must have evidential support adduced in a hearing that permits, indeed requires, the introduction of evidence by both sides. The Commissioner's revocation of PROPAC's license was arbitrary and capricious as there was no hearing permitting both

parties to introduce and scrutinize evidence. Thus, there was no guarantee that the Commissioner's decision was "uninfluenced by extraneous considerations." *Morgan*, 298 U.S. 468, 480 (1936). It must be set aside.

For all the reasons set forth above, Propac respectfully requests that rehearing be granted and that the license revocation be vacated.

Respectfully submitted,

McElroy, Deutsch & Mulvaney

Edward B. Deutsch

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.
SUPREME JUDICIAL COURT

Docket No. SJC-06610

PROPAC-MASS, INC.,

Plaintiff-Movant,

—VS.—

COMMISSIONER OF INSURANCE,

Defendant-Respondent.

MOTION FOR CLARIFICATION

PRELIMINARY STATEMENT

Plaintiff-movant, PROPAC-MASS, Inc. ("PROPAC"), respectfully moves for clarification of two seemingly-inconsistent docket entries concerning PROPAC's Petition for Rehearing in the above matter. On August 10, 1995, PROPAC simultaneously filed (1) a Motion to Enlarge Time for Filing of Petition for Rehearing and (2) a Petition for Rehearing. PROPAC received a notice that on September 7, 1995, the Supreme Judicial Court had considered PROPAC's Petition for Rehearing and denied that Petition. A copy of the September 7, 1995, notice is attached hereto as Exhibit A. That notice makes clear that this Court had in fact reviewed the merits of PROPAC's appeal.

PROPAC has filed this Motion for Clarification because of another notice received shortly before the September 7, 1995, notice. The first notice, dated August 29, 1995, indicated that the Court had denied PROPAC's Motion to Enlarge Time to File Petition for Rehearing. A copy of that notice is attached hereto as Exhibit B. Given the Court's later action on the Petition, the earlier notice appears to be in error, or, in the alternative, rendered moot by the Court's subsequent determination to act on the Petition for Rehearing.

PROPAC seeks clarification because the determination of which entry is correct controls the issue whether the time period for the filing of a petition for writ of certiorari to United States Supreme Court has expired. Specifically, PROPAC urges that inasmuch as this Court did in fact consider and rule on the Petition for Rehearing, that decision (on the merits) should be the dispositive one, and the Court should amend its docket to reflect the granting of PROPAC's Motion for an Enlargement of Time to File its Petition for Rehearing.

PROCEDURAL HISTORY

This case has its roots in defendant's December 31, 1993, revocation of PROPAC's license to exchange reciprocal contracts of insurance in the Commonwealth of Massachusetts. PROPAC first received notice of the revocation on January 3, 1993. On an Emergency Motion, Propac petitioned a Single Justice (Lynch, J.) to stay the revocation and to declare it void. The Single Justice denied the petition on March 14, 1995, and entered an Amended Order resolving the merits of the petition on March 29, 1995. PROPAC appealed to this Court, which on April 11, 1995, decided against PROPAC.

Thereafter, PROPAC petitioned to the United States Supreme Court for a writ of certiorari. However, due to counsel's miscalculation of the period for filing the petition on behalf of PROPAC, counsel filed on July 11, 1995, instead on July 10, 1995, the last day for filing of that petition. That mis-

calculation by one day prohibited the United States Supreme Court from docketing the petition.

Because the sole review available due to that miscalculation was by way of a Petition for Rehearing directed to this Court, PROPAC filed such a Petition on August 10, 1995. Because M.R.A.P. 27 provides that the time for filing such a petition is fourteen days unless that time period is expanded or reduced by the Court, PROPAC simultaneously moved for an enlargement of time for the filing of the Petition for Rehearing.

PROPAC has received two inconsistent notices concerning its Petition for Rehearing. The first is notice of a docket entry on August 29, 1995, which stated:

> Please take note that on August 10, 1995, the following entry was made on the docket of the above-referenced case:
>
> MOTION of Plaintiff-Movant PROPAC-MASS, Inc. for Leave to Enlarge Time to File Petition for Rehearing filed. August 29, 1995: Denied by the Court. Notice to Counsel.

PROPAC thereafter received a Notice of Denial of Petition for Rehearing that indicates that on September 7, 1995, "The petition for Rehearing filed in the above case *has been considered by the court* and is denied." (Emphasis added).

BRIEF STATEMENT OF FACTS

This case involves the Commissioner of Insurance's December 31, 1993, revocation of PROPAC's license to exchange contracts of interinsurance on behalf of the Subscribers of the Massachusetts Employers Insurance Exchange. Pursuant to M.G.L. c. 175, § 5 (1992 ed.) ("section five"), PROPAC petitioned for a stay of that revocation and a declaration that it was void. A Single Justice denied the petition on March 14, 1995, and issued an Amended Order on

March 29, 1995. This Court affirmed the Amended Order in its April 11, 1995, decision. It held that the revocation did not require a pre-revocation hearing and that the December 1993 hearing before Judge Roseman, at which PROPAC's license was never at issue, satisfied any due-process concerns. Accordingly, this Court never reached the issue of the constitutionality of section five. Finally, the Court held that section five does not require notice of revocation before the revocation becomes effective. PROPAC's Petition for Rehearing asked that the Court reconsider the above issue, as well as PROPAC's contention that the Commissioner's action was an arbitrary and capricious exercise of power.

PROPAC requests clarification regarding the Court's orders of August 29, 1995, and September 7, 1995. Specifically, PROPAC asks that the Court amend the docket for this case to show that this Court has in fact accepted the filing of the Petition for Rehearing, considered that Petition on its merits, and denied that Petition. PROPAC seeks clarification because the resolution of the apparent conflict between those entries is essential to the determination whether the time period for the filing of a Petition for Writ of Certiorari regarding the revocation of PROPAC's license has expired. The United States Supreme Court Rules provide that the time for filing for a writ is ninety days from the date of judgment in the matter below or ninety days from the denial of a petition for rehearing. Plaintiff-movant's position is that this Court's consideration and denial of PROPAC's Petition for Rehearing would allow PROPAC to seek review in the United States Supreme Court.

To protect PROPAC's interests, its counsel has already filed a new petition for writ of certiorari. Nevertheless, that filing recognizes the apparent conflict between the docket entries of August 29, 1995, and September 7, 1995, and includes both docket entries in the appendix to the petition. PROPAC has indicated to the United States Supreme Court that it is seeking clarification from this Court. As a first step in that process, PROPAC's counsel, Edward B. Deutsch, of McElroy,

Deutsch & Mulvaney, Morristown, New Jersey, and Raymond R. Kenney, of Martin, Magnuson, McCarthy & Kenney, Boston, Massachusetts, personally met with Jean M. Kennett, Clerk of this Court, on Friday, September 22, 1995. Ms. Kennett indicated that PROPAC would need to file a Motion for Clarification to secure from the Court its resolution of the seeming conflict between the two docket entries.

LEGAL ARGUMENT

PROPAC respectfully requests that this Court amend the docket regarding this matter to reflect the fact that this Court accepted the filing of PROPAC's Petition for Rehearing, considered the merits of the Petition, and denied it. As the September 7, 1995, docket entry makes clear, this Court in fact revisited the substantive issues involved when it considered and denied the Petition. Given that fact and recognizing that the ninety-day jurisdictional period for filing a petition for a writ of certiorari to the United States Supreme Court is intended to run from the last date that a lower court acted on the merits of an action, that this Court acknowledge that it did reconsider the merits of PROPAC's appeal on September 7, 1995—and thus triggered a ninety-day period for filing for review by the Supreme Court—appears to be the proper resolution of the conflicting orders and a triumph of substance over form.

Fairness to the innocent client, PROPAC, counsels a similar resolution by this Court. The loss of the right to Supreme Court review was occasioned by a simple, albeit disastrous, error by PROPAC's counsel. Thus, PROPAC was left without the possibility of further review and without a right to seek an adjudication of the constitutionality of M.G.L. c. 175 § 5 unless this Court agreed to consider the Petition for Rehearing. Thus, grounds certainly existed for the granting of PROPAC's motion to file its petition for rehearing beyond the usual fourteen-day period. Under *M.R.A.P.* 14(b), an appellate court or single justice "for good cause shown may upon

motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time" for a period of up to one year.

A party becomes entitled to *Rule* 14(b) relief on a showing of "good cause" for its non-compliance with the relevant time limitation. *Bernard v. United Brands Co.*, 27 Mass. App. Ct. 415, 418-19 n.8, 538 N.E.2d 1003, 1006 n.8 (App. Ct. 1989) (denying, for reasons of preclusion and for no good cause shown, relief under *M.R.A.P.* 14(b) where application for *M.R.A.P.* 4(c) on *same grounds* had already been denied). "Good cause shown" is a standard substantially similar to *Rule* 4(c)'s "excusable neglect." In *Stowe v. Bologna*, 32 Mass. App. Ct. 612, 592 N.E.2d 764 (1992), the court granted an enlargement of the time to file a petition for rehearing. The court permitted the enlargement because the decision that formed the basis of the petition to enlarge the time was issued only after the normal time for petitioning had expired, and because after the decision had been released, the petitioner had "acted very promptly." *Id.* at 613 n.4, 572 N.E. 2d at 766 n.4. *Stowe* is much like the instant case. Here, PROPAC, through its counsel, pursued what it considered to be the best course of action in light of this Court's decision: filing a petition for a writ of certiorari to the United States Supreme Court. As soon as counsel became aware of its time-calculation error, it filed a Petition for Rehearing and a Motion for Enlargement of Time for Filing of Petition for Rehearing.

If a client is justified in relying on the actions of the attorney, has acted with due diligence, and is not chargeable with culpable neglect, "justice and equity require presentation of [that client's] claim." *Hastoupis v. Gargas*, 9 Mass. App. Ct. 27, 32, 398 N.E.2d 745, 749 (App. Ct. 1980). Here, PROPAC has done nothing to warrant a denial of a hearing on its claims. Accordingly, PROPAC, through its counsel, respectfully requests that this Court amend the docket to reflect the acceptance of the filing of the Petition for Rehearing beyond the usual fourteen-day period. Moreover, such an entry accurately reflects what has transpired. This Court, by its action

of September 7, 1995, has indeed issued a determination regarding the substance of PROPAC's claim.

The liberal, flexible approach authorized by the rules of appellate procedure to relieve procedural non-compliance is especially appropriate where the fault for procedural non-compliance lies solely with counsel. Any other disposition of this motion would work an undue and inequitable hardship on PROPAC, which bears no blame for the delay in filing. Accordingly, PROPAC, through its counsel, respectfully submits that the interests of accuracy, equity, and justice favor the amendment of the docket to reflect the granting of PROPAC's Motion for Enlargement of Time for Filing of Petition for Rehearing. That disposition would remove any uncertainty regarding PROPAC's entitlement to petition for review by the United States Supreme Court within ninety days of September 7, 1995.

CONCLUSION

For the reasons set forth above, plaintiff-movant, PROPAC-MASS, Inc., respectfully requests that this Court grant this motion and enter an Order amending the docket as requested.

Respectfully submitted,

/s/ EDWARD B. DEUTSCH
Edward B. Deutsch
McElroy, Deutsch & Mulvaney
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, N.J. 07962-2075